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**China and International Human Rights: Capital Punishment
and Detention for Re-education in the Context of the
International Covenant on Civil and Political Rights**

Na Jiang

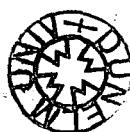
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PhD

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2006



Na Jiang

China and International Human Rights: Capital Punishment and Detention for Re-education in the Context of the International Covenant on Civil and Political Rights

Abstract

In the evolution of international human rights law, the ICCPR and other international instruments impose on State parties human rights obligations regarding the death penalty and prohibition of forced labour. China ratified a series of human rights instruments and is expected to ratify the ICCPR. There remain problems for China what international human rights obligations might mean and how far its practice departs from them. This thesis focuses on harsh punishments relating to such obligations that China might not reserve in order to explore legal consequences of accepting them and assess the relevant Chinese law, its capability of the ratification of the ICCPR.

As a member of the United Nations, China should undertake not to embark on a gross violation of any human rights obligations on capital punishment pursuant to customary international law. It also should observe treaty obligations that it accepted regarding capital punishment and forced labour as a party to the CAT, CRC, CERD, GC3, GC4, PA1, PA2, ICESCR, ILO100, ILO122 and ILO182. These treaty standards would not be abused by individual or systematic abuses with precise implementation measures.

In China, many aspects of its legislation and practice appear to conform to the requirements of the death penalty and forced labour provided in the ICCPR, to which China has not yet been a party. However, some substantive and procedural guarantees concerned appear to be breached as part of human rights obligations that China should undertake, even if not accepting the ICCPR. In the implementation of these harsh punishments, freedoms from torture and other inhuman treatment are also likely to be violated. These appear to deviate from China's present official policies concerned and breach its relevant human rights obligations.

The relationship between China's present practice and international standards tends to indicate the long course of its human rights progress. It is desirable for Chinese judges to take into account the relevant human rights standards in any sentencing decision at the discretion of them.

Table of Contents

Abstract	i
Title Page	ii
Table of Contents.....	iii
Acknowledgements.....	xii
Note to the Method of Citation.....	xiii
Declaration.....	xv
Statement of Copyright.....	xv
Table of Statutes.....	xvi
Table of Cases.....	xxiii
List of Abbreviation.....	xxix
 Bibliography.....	 xliii
 GENERAL INTRODUCTION	 1
 Chapter I THE INTRODUCTION	 12
 1.1 A General Theory on International Human Rights Standards.....	 12
1.1.1 Sources of the Law.....	12
1.1.1.1 The Quasi-legislative process.....	13
1.1.1.2 The Interpretation of human rights standards.....	14
1.1.2 Supervising the Law.....	19
1.1.2.1 International implementation.....	19
1.1.2.1.1 <i>UN Charter-based bodies</i>	19
1.1.2.1.1.1 International Competence.....	20
1.1.2.1.1.2 Internal Competence.....	27
1.1.2.1.1.2.1 Power competence.....	27
1.1.2.1.1.2.2 The Charter mechanisms.....	30
1.1.2.1.1.2.3 The political nature of the Charter procedures.....	32
1.1.2.1.1.2.4 The UN reform.....	33

1.1.2.1.2 <i>UN treaty-based bodies</i> ...	34
1.1.2.2 National implementation...	35
1.1.3 Enforcement of the Law...	37
1.1.3.1 International enforcement...	37
1.1.3.1.1 <i>The SC's powers</i> ...	37
1.1.3.1.2 <i>The SC practice</i> ...	37
1.1.3.2 National enforcement...	39
1.1.3.2.1 <i>Obligations Erga Omnes</i> ...	39
1.1.3.2.2 <i>Obligations of national courts in enforcement</i> ...	43
1.1.3.2.3 <i>Assessment of enforcement</i> ...	44
1.2. China's Cooperation ...	44
1.2.1 General...	45
1.2.2 Conflicts...	47
1.2.3 Recent Developments...	50
1.2.3.1 China's statements...	50
1.2.3.2 The EU-China dialogue...	52
1.2.3.3 The US-China dialogue...	57
1.2.3.4 Visits to China...	58
1.3 Summary ...	60

Chapter II THE DEATH PENALTY AND INTERNATIONAL HUMAN RIGHTS LAW

62

2.1 General ...	62
2.2 The ICCPR ...	65
2.2.1 The Right to Life...	66
2.2.2 Capital Punishment...	69
2.2.2.1 Limitations on legislation...	69
2.2.2.1.1 <i>Non-retroactivity</i> ...	69
2.2.2.1.2 <i>Non-reintroduction</i> ...	70
2.2.2.1.3 <i>Conformity with the provisions of the ICCPR and CPPCG</i> ...	71
2.2.2.1.4 <i>Most serious crimes</i> ...	72
2.2.2.2 Limitations on imposition...	74

2.2.2.2.1 Competent, independent and impartial tribunal...	74
2.2.2.2.2 Equality before the courts...	75
2.2.2.2.3 Right to a fair and public hearing...	75
2.2.2.2.4 Minimum guarantees of the accused in criminal trials...	77
2.2.2.2.4.1 Presumption of Innocence...	77
2.2.2.2.4.2 Right to Be Informed of the Charge...	77
2.2.2.2.4.3 Preparation of the Defence...	78
2.2.2.2.4.4 Claim to Be Tried without Undue Delay...	78
2.2.2.2.4.5 Right to Defence...	79
2.2.2.2.4.6 Calling and Examining Witnesses...	80
2.2.2.2.4.7 Claim to the Free Assistance of an Interpreter...	80
2.2.2.2.4.8 Prohibition of Self-incrimination...	81
2.2.2.2.4.9 Juvenile Trials...	81
2.2.2.2.4.10 Right to an Appeal...	82
2.2.2.2.4.11 Right to Compensation for Miscarriage of Justice...	82
2.2.2.2.4.12 The Principle of ‘Ne Bis In Idem’...	83
2.2.2.2.5 Prohibition of the death penalty for persons under the age of 18...	83
2.2.2.3 Limitations on execution...	84
2.2.2.3.1 Amnesty, pardon or commutation of the death penalty...	84
2.2.2.3.2 Prohibition of execution of pregnant women...	84
2.2.2.3.3 Extradition, expulsion, deportation and the death penalty...	85
2.2.2.3.4 Humane treatment...	86
2.3 Optional Protocols ...	88
2.4 The CAT ...	89
2.5 The CRC ...	98
2.6 The CERD ...	103
2.7 Regional Human Rights Standards ...	103
2.7.1 The ECHR...	103
2.7.2 The ECHR-PN6...	105
2.7.3 The ECHR-PN13...	106
2.7.4 The ACHR...	106
2.7.5 The ACHR-P-DP...	108

2.7.6 The <i>ACHPR</i> ...	109
2.7.7 The <i>ACRWC</i> ...	110
2.7.8 The <i>ACharter</i> ...	111
2.8 The GC3, GC4, PA1 and PA2 ...	111
2.8.1 The <i>GC3</i> ...	111
2.8.2 The <i>GC4</i> ...	113
2.8.3 The <i>PA1</i> ...	115
2.8.4 The <i>PA2</i> ...	115
2.9 Customary International Law ...	116
2.9.1 Substantive Limits to Capitally Punishable Offences...	117
2.9.1.1 The protection of the right to life against its arbitrary deprivation ...	117
2.9.1.2 The ‘most serious crimes’ clause...	120
2.9.1.3 Political offences...	121
2.9.1.4 Offences committed by persons under military occupation...	121
2.9.1.5 Non-reintroduction...	122
2.9.1.6 Non-retroactivity...	123
2.9.2 Procedural Restrictions on Its Imposition ...	123
2.9.2.1 The right to a fair trial...	124
2.9.2.2 Appeal...	126
2.9.2.3 Pardon, clemency, reprieve or commutation...	127
2.9.2.4 Humane treatment...	128
2.9.3 The Exemptions of Certain Categories of Persons...	130
2.9.3.1 Persons below 18 Years Old...	130
2.9.3.2 Pregnant women and mothers of young children...	131
2.9.3.3 The elderly over 70 years old...	132
2.9.3.4 The insane...	132
2.10 Summary ...	133

Chapter III THE DEATH PENALTY: CHINA’S PRACTICE AND POLICY	135
3.1 General ...	135
3.2 Legislation ...	137

3.2.1 The 1982 Constitution	137
3.2.1.1 Legislature	138
3.2.1.2 Judicial organs.....	138
3.2.2 Substantive Criminal Legislation on the Death Penalty.....	139
3.2.2.1 General provisions.....	140
3.2.2.1.1 <i>The applicable scope in principle</i>	140
3.2.2.1.2 <i>The exclusive categories</i>	140
3.2.2.1.2.1 Young Persons and Pregnant Women	140
3.2.2.1.2.2 The Mental Patients	141
3.2.2.1.3 <i>The death penalty with a suspension of execution</i>	141
3.2.2.1.4 <i>Others</i>	143
3.2.2.2 Specific Provisions	143
3.2.3 Procedural Criminal Laws on the Death Penalty.....	147
3.2.3.1 Ordinary procedures.....	148
3.2.3.1.1 <i>The jurisdiction</i>	148
3.2.3.1.1.1 Advantages.....	148
3.2.3.1.1.2 Disadvantages.....	150
3.2.3.1.2 <i>Rights of those facing the death penalty</i>	150
3.2.3.1.2.1 General.....	150
3.2.3.1.2.2 Rights to Defence and Legal Aid.....	151
3.2.3.1.2.2.1 The defence system.....	151
3.2.3.1.2.2.2 The system of legal aid.....	154
3.2.3.1.3. <i>Procedure for the first instance</i>	155
3.2.3.1.4. <i>Procedure for the second instance</i>	158
3.2.3.1.4.1 The Initiation.....	158
3.2.3.1.4.1.1 The appeal of the defendants.....	159
3.2.3.1.4.1.2 The prosecutorial Protest.....	161
3.2.3.1.4.2 The Hearing Approach.....	161
3.2.3.2 Procedure for review of death sentences.....	162
3.2.3.2.1 <i>Approval scope</i>	162
3.2.3.2.2 <i>Approval power</i>	163
3.2.3.2.2.1 The Course of Transference.....	164
3.2.3.2.2.2 Assessment.....	166

3.2.3.2.3. <i>Means</i>	167
3.2.3.3 Procedure for enforcement of death sentences.....	168
3.2.3.3.1 <i>Executive bases and subjects</i>	168
3.2.3.3.1.1 Executive Bases.....	168
3.2.3.3.1.2 Executive Bodies.....	169
3.2.3.3.2 <i>Specific procedures</i>	169
3.2.3.3.3 <i>Enforcement approach</i>	170
3.2.3.3.4 <i>The enforcement procedure for death sentences with a suspension of execution</i>	171
3.2.3.4 Procedure for trial supervision of death sentences.....	171
3.2.3.4.1 <i>General</i>	171
3.2.3.4.2 <i>Advantages</i>	172
3.2.3.4.2 <i>Disadvantages</i>	172
3.2.3.4.3 <i>Procedure for compensation of death sentences</i>	173
3.3 Judicial Practice	175
3.3.1 The Applicable Scope.....	177
3.3.1.1 The general scope.....	177
3.3.1.1.1 <i>Basic understandings</i>	177
3.3.1.1.1.2 Influencing Factors.....	177
3.3.1.1.1.2.1 ‘Strike Hard’.....	178
3.3.1.1.1.2.2 Indignation.....	179
3.3.1.1.1.2.3 Opinions of legal experts.....	179
3.3.1.2 The exclusive categories.....	180
3.3.2 Other Substantive Issues.....	180
3.3.3 Ordinary Procedures for Death Sentences.....	181
3.3.3.1 General.....	181
3.3.3.2. The first instance.....	181
3.3.3.2.1 <i>Jurisdiction</i>	181
3.3.3.2.2 <i>Trial</i>	181
3.3.3.3 The second instance.....	182
3.3.3.3.1 <i>Initiation</i>	182
3.3.3.3.2 <i>Hearing scope</i>	182
3.3.3.3.3 <i>Hearing approach</i>	182

3.3.2.3.4 Results.....	183
3.3.4 Procedure for Review of Death Sentences.....	184
3.3.5 Procedure for Trial Supervision.....	185
3.3.5.1 Initiation.....	185
3.3.5.2 The trial.....	186
3.3.6 The Judicial Situation of Procedural Rights.....	187
3.3.6.1 The rights inferred from legal obligations of judicial bodies.....	187
3.3.6.1.1 <i>The right to a fair trial</i>	187
3.3.6.1.1.1 Equality before the Law.....	187
3.3.6.1.1.2 The Principle of Nulla Poena Sine Lege.....	188
3.3.6.1.1.3 Presumption of Innocence	189
3.3.6.1.1.4 An Independent and Impartial Trial.....	190
3.3.6.1.1.5 A Public Trial.....	192
3.3.6.1.1.6 On the Principle of Ne Bis In Idem.....	193
3.3.6.1.1.7 Degree of Proof	193
3.3.6.1.2 <i>Humane treatment</i>	194
3.3.6.2 Rights available to the accused party.....	197
3.3.6.2.1 <i>The rights to defence and legal aid</i>	197
3.3.6.2.2 <i>The right to call and examine witnesses</i>	199
3.3.6.3 Rights to eliminate the effect of misjudged sentences.....	200
3.3.6.3.1 <i>The right of appeal</i>	200
3.3.6.3.2 <i>The right of criminal compensation</i>	201
3.4 Conclusion	201

Chapter IV FORCED LABOUR AND INTERNATIONAL HUMAN RIGHTS LAW 205

4.1 General	205
4.2 The ICCPR	207
4.2.1 The Scope of Prohibition of Forced Labour.....	207
4.2.1.1 General scope.....	207
4.2.1.2 Exceptions.....	209
4.2.1.2.1 <i>Hard labour as punishment for a crime</i>	209

4.2.1.2.2 <i>Work in detention</i>	210
4.2.1.2.3 <i>Military and national service</i>	211
4.2.1.2.4 <i>Duties in cases of emergency</i>	212
4.2.1.2.5 <i>Normal civic obligations</i>	212
4.2.2 Other Relevant Provisions	213
4.3 The UDHR	213
4.4 The ICESCR	215
4.5 The CMW	216
4.6 The CRC	217
4.7 The CAT	218
4.8 Subsidiary Instruments	220
4.8.1 The CLN	220
4.8.2 The SSFL	221
4.8.3 The ILO29	221
4.8.4 The ILO100	223
4.8.5 The ILO105	224
4.8.6 The ILO122	224
4.8.7 The ILO182	225
4.9 Regional Human Rights Law	225
4.9.1 The ECHR	225
4.9.1.1 General considerations	225
4.9.1.2 The specific scope of permitted work or service	227
4.9.2 The ESC	230
4.9.3 The ADRDM	231
4.9.4 The ACHR	232
4.9.5 The ACHPR	233
4.10 Possible Customary International Law Concerned	234
4.11 Conclusion	237
 Chapter V FORCED LABOUR: CHINA'S POLICY AND PRACTICE	239
 5.1 Introduction	239
5.2 The Chinese Policy of Forced Labour	240

5.2.1 Official Opinions on RTL and RETL.....	240
5.2.1.1 RTL.....	240
5.2.1.2 RETL.....	241
5.2.2 The Controversy on Both RTL and RETL.....	243
5.3 The Practice.....	245
5.3.1 The Common Constitutional Basis in Legal Practice.....	245
5.3.2 Practices of RTL.....	249
5.3.2.1 General.....	249
5.3.2.2 Violations of international human rights instruments.....	250
5.3.2.2.1 <i>Forced Labour</i>	250
5.3.2.2.2 <i>Other Violations</i>	252
5.3.3 Practices of RETL.....	254
5.3.3.1 Petty crimes.....	255
5.3.3.2 Illegal acts	259
5.3.3.2.1 <i>Administrative feature</i>	259
5.3.3.2.2 <i>Violation of prohibition of forced labour</i>	262
5.3.3.2.2.1 RETL at the Initial Stage.....	262
5.3.3.2.2.2 The Present RETL.....	263
5.3.3.2.2.3 Other Violations of Human Rights Instruments.....	263
5.3.4 Reform Measures.....	264
5.4 Conclusion.....	267

Chapter VI THE CONCLUSION 270

6.1. Assessment of A Current Approach to This Research.....	270
6.1.1 Advantages.....	270
6.1.2 Disadvantages.....	273
6.2 Obstacles to China's Human Rights Protection.....	274
6.3 China's Possible Participation in International Human Rights Treaties	277
6.3.1 Human Rights Education.....	278
6.3.2 Human Rights Research.....	280
6.3.3 Human Rights Measures.....	282

GENERAL CONCLUSION 285

Acknowledgements

First and foremost I would like to express my sincere and profound gratitude to my supervisor, Professor Colin Warbrick, who taught me international human rights law from ABC and supervised my thesis. I am highly indebted to him for his painstaking, supportive and very excellent supervision, which he exhibited throughout the supervision of my thesis. I highly appreciate his great kindness and I owe him a lot of respect for that. Words alone are inadequate to express my gratitude, but I am sure he knows I am highly grateful to him.

Secondly I would also like to express my very sincere and special thanks to my internal and external examiners, Dr K.H. Kaikobad, and Dr Stephen Neff, for their beneficial comments and suggestions, which have enhanced the quality of this thesis. My sincere gratitude also goes to Ms Holly Cullen, for her frequent and the invaluable contributions which made and which have helped in the success of this thesis. Any advice from them are excellent and worthy of being highly appreciated.

At this juncture, I want to say a special thank you to my dearest parents for both their financial and moral support which they have been rendering to me right from my birth up to this stage. I am indeed very grateful and appreciative to them for everything they have done and will continue to do for me.

My appreciation will be incomplete if I forgot to acknowledge the contributions of Mr Francis O. Oni, a PhD candidate in the Law Department, for proof-reading my entire thesis. Furthermore, my sincere appreciation and gratitude go to Professor Louise T. Higgins, a professor of psychology from the University of Chester, and Mr Shah Ashraf Ali, a student at Northumbria University who also helped so much in proof-reading some of the chapters of my thesis. Professor Higgins' contributions in particular can never be forgotten, they indeed helped in the successful realization of my dream to undertake and successfully complete a PhD programme.

Last but not the least, my special appreciation goes to the staff of the Palace Green Library and the Law Department for their care and support they gave me throughout my study times at the University of Durham.

Note on the Method of Citation

1. Literature

Authors of books are printed with ordinary Roman type. In the case of original citation, an abbreviated form is used, by indicating only the author's (editor's) surname, whereas the full name of Chinese authors are translated. The slash is also used between the surname of authors and year when the book was published, and between the year and pages where the citation is from in the book, e.g., Boutros-Ghali/1995/5. Moreover, under the title of an author with more than one publication, the order number is used to distinguish publications from each other or one another, e.g., Evans1/2003/1-7 or Evans2/2003/757. Where there are different volumes in a series of books with the same author and paragraph numbers are available, the numbers of a particular volume and the relevant paragraph are also cited, together with the author name, publishing year and page number, e.g., Simma/2002/II/925/[26].

Meanwhile, authors of Articles are printed with the same type and in an abbreviated form as well. The book or journal which an article derives from is also used in an abbreviated approach, e.g., Alston, in Alston/1992/4; or Nowak, in *NYIL*/1991/86.

The full titles and relevant more details of both books and articles are listed in the Bibliography for reference. The English translation of Chinese titles is also available with *pinyin*, the pronunciation rule, of the relevant Chinese titles, e.g., History and Reform--The Course of Establishing Legal Systems in the PRC [Lishi Yu Biange Xinzhongguo Fazhi Jianshe De Licheng]. In the event of English translations supplied by the authors of Chinese versions, only English titles are available, instead of both the *pinyin* of Chinese titles and English translations concerned.

2. UN Documents, Case Law and Other International Instruments

UN Documents are basically cited by listing the full or abbreviated title and corresponding document number, i.e., without explicit reference to the UN.

Individual communications are listed by the title of cases involved or communication numbers. GCs are indicated by the number of a comment and relevant article number in the following. For example, GC/6(6) means GC No. 06 pursuant to Article 6 of the ICCPR.

With regard to references to the case law of the ICJ, the year, page and even paragraph number are accompanied by a citation to the ICJ Reports, e.g., ICJ Reports/1986/107. In the citation to other types of cases, the application number or the name of the case is usually contained.

Furthermore, other international instruments are cited by merely listing the related document number, e.g., UN Doc. A/RES/2200A (XXI), 993/UNTS/3. All the relevant abbreviations are available in the Bibliography.

3. E-Documents

A range of documents were obtained from various websites on line. E-Documents are listed in the title of a particular website and followed by the order number of the cited document in the list of the category titled with the website, e.g., AI 1. Without the number in the list, the title itself of the website is used, e.g., DIHR. The website title followed by 'Home' refers to the home page of this website, e.g., CHR Home. More details are contained in the Bibliography.

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Statement of Copyright

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Table of Statutes

International & Regional

Both international and regional human rights documents and materials are available from the websites of the UN at <<http://www.un.org/rights/>>, University of Minnesota Human Rights Library at <<http://humanrights.law.monash.edu.au/index.html>>, World Legal Information Institute at <<http://www.worldlii.org/>>, the Council of Europe Treaty Series at <<http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp>>, or from 'International Laws and Regulations', in China's Human Rights, online at <<http://www.humanrights-china.org/zt/lawsandregulations/menu.asp?id=26>>

China

I. Chinese laws and regulations in English are available from 'Chinese Laws and Regulations', in People's Daily, Online at <<http://english.people.com.cn/data/laws/laws.php>>, or from 'Laws & Regulations', in China's Human Rights, online at <<http://www.humanrights-china.org/zt/lawsandregulations/index.html>>

Constitution of the People's Republic of China, approved on 4th December 1982

Amendment to the Constitution of the People's Republic of China, approved on 15th March 1999, by the 9th NPC at its 2nd Session

Amendment to the Constitution of the People's Republic of China, approved on 12th April 1988, by the 7th NPC at its 1st Session

Amendment to the Constitution of the People's Republic of China, approved on 14th March 2004, by the 10th NPC at its 2nd Session

Criminal Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress in 1997

Amendment to the Criminal Law of the People's Republic of China, adopted in 1999

Amendment II to the Criminal Law of the People's Republic of China (Order of the President No.56), adopted at the 23rd Meeting of the Standing Committee of the Ninth National People's Congress on 31st August 2001

Amendment III to the Criminal Law of the People's Republic of China (Order of the President No.64), adopted at the 25 Meeting of the Standing Committee of the Ninth National People's Congress on 29th December 2001

Criminal Procedure Law of the People's Republic of China

Law of the People's Republic of China on State Compensation, adopted on 12th May 1994 at the Seventh Session of the Standing Committee of the Eighth National People's Congress and promulgated on the same day

Administrative Procedure Law, coming into force as of 1st October 1990

Regulations on Administrative Reconsideration, effective on 1st January 1991 and amended on 9th October 1994

Administrative Punishment Law, coming into force as of 1st October 1996

Public Procurators Law of the People's Republic of China

Judges Law of the People's Republic of China, adopted on 1st July 1995

Law of the People's Republic of China on Lawyers, effective as of 1st January 1997

Law of the People's Republic of China on Administrative Penalty, implemented as of 1st October 1996

Public Procurators Law of the People's Republic of China, coming into force as of 1st July 1995

Labour Law of the People's Republic of China, adopted at the Eighth Meeting of the Standing Committee of the Eighth National People's Congress on 5th July 1994, promulgated by Order No.28 of the President of the People's Republic of China and effective as of 1st January 1995

Regulations on the Composition of Gross Wages, ratified by the State Council on 30th September 1989 and promulgated as the No. 1 Instruction of the National Bureau of Statistics on 1st January 1990

Regulations on Labour Protection in Workplaces Where Toxic Substances Are Used, adopted at the 57th Executive Meeting of the State Council on 30th April 2002, promulgated by Decree No.352 of the State Council of the People's Republic of China on 12th May 2002 and effective as of the date of promulgation

Regulations on Reporting and Handling Fatal Accidents of Workers and Employees in Enterprises, effective as of 1st March 1993

Regulations Concerning the Labour Protection of Female Staff and Workers, implemented from 1st September 1988

Rules for the Administration of Employment of Foreigners in China, promulgated jointly by the Ministry of Labour, Ministry of Public Security, Ministry of Foreign Affairs and the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China on 22nd January 1996

Law of the PRC of Industrial Enterprises Owned by the Whole People, adopted at the First Session of the Seventh National People's Congress and promulgated by Order No.3 of the President of the People's Republic of China on 13th April 1988 and effective as of 1st January 1988

The Trade Union Law of the People's Republic of China, adopted on 3rd April 1992 at the 5th Session of the 7th National People's Congress

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II. Those in Chinese are available from China Legislative Information Network System Full Text Search System (Chinese version only), online at <<http://www.chinalaw.gov.cn/jsp/jalor/index.jsp?id=menuhtcwzy03>>

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Measures of the State Council on Housed Re-education of Prostitutes and Prostitute Visitors in 1993

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Notice of the MOJ on Strengthening the Safety of Production and Work at Prisons and RETL Institutions in 1997

Notice of the MOPS and MOJ on RETL and the Cancellation of Household Registry in Cities of the Persons in RETL in 1984

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Simms v. Jamaica (CCPR/C/53/D/541/1993)
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Uigun and Ruzmetov v. Uzbekistan (CCPR/C/86/D/915/2000)

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VII. South Africa

S v Makwanyane and Another, 1995 SACLR LEXIS 218

List of Abbreviations

1954R-RTL	Regulations on Reform through Labour of the PRC in 1954
1954Constitution	Constitution of the PRC in 1954
1957D-RETL	Decision of the State Council Regarding the Question of Rehabilitation Through Labour, approved on 1 st August 1957
1975Constitution	Constitution of the PRC in 1975
1978Constitution	Constitution of the PRC in 1978
1979CL	Criminal Law of the PRC in 1979
1979CPL	Criminal Procedure Law of the PRC in 1979
1979NDS	Notice of the Supreme People's Court on Several Rules Concerning Submitting Death Sentences for Approval, in 1979
1979SP-RETL	Supplementary Provisions of the State Council for Rehabilitation Through Labour, approved on 29 th November 1979
1981DHC	Decision on Handling Convicts undergoing RTL and Persons undergoing RETL with Escape or Repeat Offenses in 1981
1981DPA	Decision on the Issue of Power to Approve Death Sentence Cases, adopted in 1981
1981PR	Provisional Regulations on Punishing Military Personnel for Violation of Duty, adopted in 1981
1982Constitution	Constitution of the PRC, adopted in 1982
1982TM-RETL	Trial Method on RETL, issued in 1982
1983NDS	Notice on Authorizing HPCs and Military Courts of PLA to Approve Part of Death Sentences, issued in 1983
1983OL	Organic Law of the People's Court of the PRC, adopted on 2nd September 1983
1990APL	Administrative Procedure Law of the PRC, adopted in 1990
1990R-DH	Regulations on Detention Houses of the PRC, adopted in 1990
1994LL	Labour Law of the PRC, adopted in 1994
1994PL	Law on Prisons of the PRC, adopted in 1994
1994SCL	Law of the PRC on State Compensation, adopted in 1994

1995PPL	People's Police Law of the PRC, adopted in 1995
1995JL	Judges Law of the PRC, adopted in 1995
1996APL	Law on Administrative Punishments, adopted in 1996
1996CPL	Criminal Procedure Law of the PRC, adopted in 1996
1996LL	Law of the PRC on Lawyers, adopted in 1996
1997CL	Criminal Law of the PRC, adopted in 1997
1997NDS	Notice of the SPC on Authorizing HPCs and Military Courts of PLA to Approve Part of Death Sentences, issued in 1997
1998IECPL	Interpretation of the SPC on Some Issues in Enforcement of the 1996CPL, issued in 1998
1998RECPL	Regulations of the SPC, SPP, MOPS, MOSS, MOJ and NPCLC on Some Issues in Enforcement of the 1996CPL, issued in 1998
1998RSPCDP	Reply of the Supreme People's Court on Whether to Apply Capital Punishment to Pregnant Woman Normally Aborted during Detention in Trial
2000LL	Legislation Law of the PRC
2001Communication	EU Strategy towards China: Implementation of the 1998 Communication and Future Steps for a More Effective EU Policy
2001Conference	Conference on National Work of Social Order and Public Security in 2001
2001PL	Prosecutors Law, adopted in 2001
2002R-RETL	Regulations on Public Security Bodies Handling RETL Cases
2003Communication	A Maturing Partnership-Shared Interests and Challenges in EU-China Relations
2003NSE-CPL	Notice on the Strict Enforcement of the Criminal Procedure Law and on the Conscientious Prevention and Correction of Extended Detention
2003RLA	Regulations on Legal Aid
2003RPAPCP	Regulations on the Procedures for Applications by Prisons for Commutation and Parole

2003RRRP	Regulations on Reform through Reeducation in Prisons
2003RVCFP	Regulations on Visits to and Correspondence of Foreign Prisoners
2004Amendment	Amendment to the Constitution of the People's Republic of China in 2004
2004DISPJ	Decision on Improving the System of People's Jurors
2004DPJALRFD	Decision on Providing Judicial Aid to Litigants with Real Financial Difficulties
2004OIS-A	Opinions on Interrogating Suspects When Handling and Investigating Cases Involving Arrest
2004RPPELPLCP	Regulations of People's Procuratorates to Ensure the Lawful Practice of Lawyers in Criminal Procedures
2004PRLVCC	Provisional Regulations on Lawyers' Visits to Criminals in Custody
2004UNCUCCDP	Urgent Notice on Clearing Up Cases Concerning Delayed Payment for Construction Projects and Wages of Migrant Workers
2005NPH	The SPC's Notice on Further Doing Well the Work of Public Hearings in the Second Instance of Death Sentence Cases
A/	General Assembly, United States
ACharter	Arab Charter on Human Rights
ACHPR	African Charter of Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACHR	American Convention on Human Rights
ACHR-P-DP	Protocol to the American Convention on Human Rights to Abolish the Death Penalty
/Add.	Addendum
ADRDM	American Declaration on the Rights and Duties of Man
AFAR	Association for Asian Research
AFIC	All-China Federation of Industry & Commerce
AFROC	All-China Federation of Returned Overseas Chinese
AFTU	All-China Federation of Trade Unions

AHRCourt	Inter-American Court of Human Rights
AHRComm	African Commission on Human and People's Rights
AI	Amnesty International
A-III	Amendment III to the Criminal Law of the People's Republic of China (29/12/2001)
A-IV	Amendment IV to the Criminal Law of the People's Republic of China (28/12/2002)
AJIL	The American Journal of International Law
ALA	All-China Lawyers' Association
ATCom	Committee against Torture
AWF	All-China Women's Federation
AYF	All-China Youth Federation
B.C.	Before Christ
BCPSB	Beijing City Public Security Bureau
BDHRL	Bureau of Democracy, Human Rights, and Labour
BPDC	Building of Political Democracy in China
BPCs	Basic People's Courts
<i>BW</i>	<i>Beijing Wanbao</i>
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCF	China Charity Federation
CCP	Chinese Communist Party
CCTF	China Children and Teenagers' Fund
CDPF	China Disabled Persons' Federation
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CEA	Compulsory Education Act
CFHRD	China Foundation for Human Rights Development
CFREU	Charter of Fundamental Rights of the European Union

China/PRC	the People's Republic of China, founded in 1949
CHDPR	China Hints at Death Penalty Reform
CHR	China's Human Rights
CHRS-PUC	Centre for Human Rights Studies, People's University of China
CHS-FU	Centre for Humanity Studies, Fudan University
<i>CILJ</i>	<i>Cornell International Law Journal</i>
<i>CJTL</i>	<i>Columbia Journal of Transnational Law</i>
CL	Criminal Law
<i>CL1</i>	<i>Chinese Lawyer</i>
<i>CLF</i>	<i>Criminal Law Forum</i>
CLN	The Covenant of the League of Nations
<i>CLOC</i>	<i>Criminal Lawyers of China</i>
CLRC	The Collection of the Laws and Regulations of the PRC
/CN	Commission
CN	Communication No.
CNSOPSW	Conference on National Social Order and Public Security Work
COHRCURT	Concluding Observations of the Human Rights Committee United Republic of Tanzania
COI	Concluding Observations on Israel
COE	Council of Europe
COM	Communication of the Commission
ComSW	Committee on the Status of Women
/CONF	Conference
CPF	China Poverty-relief Foundation
CPPCC	Chinese People's Political Consultative Conference
CP-USSD	Human Rights Country Reports by US State Department
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CPHR2003	China's Progress in Human Rights: 2003 (03/2004)
CPHR2004	China's Progress in Human Rights in 2004(04/2005)
CPPCG	Convention on the Prevention and Punishment of the Crime of

	Genocide
CRC	Convention on the Rights of the Child
CRCom	Committee on the Rights of the Child
CRHRP-2004	Country Reports on Human Rights Practices-2004
CRHRP-2003	Country Reports on Human Rights Practices-2003
CRIC	Criminal Reform in China
CRLN	China's Rule of Law Net
CSHRS	China Society for Human Rights Studies
CWDF	China Women Development Foundation
CYLC	Communist Youth League of China
DBST	1976 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DDASIS	Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty
DELCHN	Delegation of the European Commission to China
DIHR	The Danish Institute for Human Rights
DIWE	Decision on the Issue of Work Employment
Doc.	Document
DPIL	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations
DRRP	Declaration on Race and Racial Prejudice
E/	Economic and Social Council
EA	Education Act
ECE	European Convention on Extradition
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECHR-PN6	Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms

ECHR-PN13 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances

EHRCourt European Court of Human Rights

EC European Commission

ECOSOC Economic and Social Council

E/C.2 the ECOSOC Committee on governmental organizations

E/CN.4 the ECOSOC Commission on Human Rights

ed. Editor

edn Edition

eds. Editors

ERDCom the Committee on the Elimination of Racial Discrimination

ESAE-SR Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur

ESC The European Social Charter

ET-CR Extradition Treaty between the People's Republic of China and the Russian Federation

ETS European Treaty Series

EUMSP European Union Minimum Standards Paper

EU European Union

EUCHRN EU-China Human Rights Network

FCO Foreign & Commonwealth Office

FMPRC Foreign Ministry of the People's Republic of China

FS Falv Shiyong

GA/A United Nations General Assembly

GAOR General Assembly Official Records

GC General Comment

GCs General Comments

GC1 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

GC2	Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GC3	Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War
GC4	Geneva Convention relative to the Protection of Civilian Persons in Time of War
GC/6(6)	General Comment No. 06: The right to life (Article 6): 30/04/82
GC/13(14)	General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14): 13/04/84
GC/20(7)	General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7): 10/03/92
GGRFCPR	General Guidelines Regarding the Form and Contents of the Periodic Report
<i>GJIL</i>	<i>Georgetown Journal of International Law</i>
GPCL	General Principles of Civil Law
GRCL	General Rules of Civil Law
GSWGR	General Situation of Women and Gender Research Centre of Sen Yat-Sun University
<i>GWLR</i>	<i>George Washington Law Review</i>
<i>GZCJXX</i>	<i>Gansu Zhengfa Chengren Jiaoyu Xueyuan Xuebao</i>
HA	Inheritance Act
<i>HLS</i>	<i>Hebei Law Science</i>
HNBY	He Nan Bao Ye
HPCs	Higher People's Courts
HRB	Human Rights Brief
HRC	Commission on Human Rights, the United Nations
HRC1991	Human Rights in China (1991)
HRCom	Human Rights Committee
HRCoun	Human Rights Council, the United Nations
HRIC	Human Rights in China ...
<i>HRQ</i>	<i>Human Rights Quarterly</i>

HRW Human Rights Watch

Ibid.	Ibidem or in the same place
ICC	International Criminal Court
ICCPR/CCPR	International Covenant on Civil and Political Rights
ICCPR-OP1	Optional Protocol to the International Convention on Civil and Political Rights
ICCPR-OP2-DP	Second Optional Protocol to the International Convention on Civil and Political Rights Aiming at the Abolition of the Death Penalty
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Reports	International Court of Justice. Reports of judgments, Advisory Opinions and Orders
ICJ Statute	Statute of the International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	Implementation Force
IGO	intergovernmental organization
IHRR	International Human Rights Reports
Law-lib	Legal Thesis Database
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILO29	Convention concerning Forced or Compulsory Labour
ILO100	Equal Remuneration Convention
ILO105	Abolition of Forced Labour Convention
ILO122	Remuneration Policy Convention
Intro.	With an introduction by
IOPRC	Information Office of the State Council of the PRC
IPCs	Intermediate People's Courts

<i>LL</i>	<i>Law & Life</i>
<i>LPMPIS</i>	<i>Law on Punishments in respect to Management of Public Security</i>
<i>Implementation</i>	<i>Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1989/64)</i>
<i>JAEGPSLI</i>	<i>Journal of Adult Education of Gansu Political Science and Law Institute</i>
<i>JC</i>	<i>Justice of China</i>
<i>JCLC</i>	<i>Journal of Criminal Law and Criminology</i>
<i>JCSJ</i>	<i>Jiancha Shijian</i>
<i>JF</i>	<i>Jiancha Fengyu</i>
<i>JFP</i>	<i>Jinling Falv Pinglun</i>
<i>JFPS</i>	<i>Journal of Fujian Public Security Higher College</i>
<i>JGPOVC</i>	<i>Journal of Guizhou Police Officer Vocational College</i>
<i>JGZXX</i>	<i>Jilin Gaodeng Zhuanke Xuexiao Xuebao</i>
<i>JHJPVC</i>	<i>Journal of Henan Judicial Police Vocational College</i>
<i>JHRTU</i>	<i>Journal of Hebei Radio & TV University</i>
<i>JJPSC</i>	<i>Journal of Jiangsu Public Security College</i>
<i>JLACPJ</i>	<i>Journal of Liaoning Administrators College of Police and Justice</i>
<i>JQU</i>	<i>Journal of Qiqihar University</i>
<i>JS</i>	<i>Jiafangjun Shenghuo</i>
<i>JSUST</i>	<i>Journal of Southwest University of Science and Technology</i>
<i>JWH</i>	<i>Justice Work Handbook</i>
<i>JWMMI</i>	<i>Journal of Wuhan Metallurgical Manager's Institute</i>
<i>JWPSCC</i>	<i>Journal of Wuhan Public Security Cadre's Collage</i>
<i>JXTC</i>	<i>Journal of Xinxiang Teachers College</i>
<i>JXU</i>	<i>Journal of Xiangtan University</i>
<i>JYPOA</i>	<i>Journal of Yunnan Police Officer Academy</i>
<i>KFOR</i>	<i>Kosovo Force</i>
<i>LC</i>	<i>Lanzhou Chenbao</i>
<i>LCPSB</i>	<i>Lanzhou City Public Security Bureau</i>

LEXIS	LexisNexis Total Research System
LN	League of Nations
LNTS	League of National Treaty Series
MA	Marriage Act
MLS	Modern Law Science
MOC	Ministry of Culture
MOCAC	Ministry of Civil Affairs Commission
MOJ	Ministry of Justice
MOLSS	Military of Labour & Social Security
MOPS	Ministry of Public Security
MOU	Memorandum of Understanding
NC	National Congress
NGO	nongovernmental organisation
NLR	New Laws and Regulations
No.	Number
NPC	National People's Congress
<i>NYIL</i>	<i>Netherlands Yearbook of International Law</i>
<i>NJCLJ</i>	<i>National Judges College Law Journal</i>
<i>NJIL</i>	<i>Nordic Journal of International Law</i>
NWC-CW	National Working Committee for Children and Women under the State Council
OAS	Organisation of American States
OAST	Organization of American States Treaty Series
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights, the UN
OLGPAD	Office of the Leading Group for Poverty Alleviation and Development
OJ	Official Journal
OPI-ICCPR	First Optional Protocol to the ICCPR
OYCF	Overseas Yong Chinese Forum

p.	page
PA1	Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts
PA2	Protocol Additional to Geneva Convention relative to the Protection of Civilian Persons in Time of War
PAP	People's Armed Police
P5	permanent members of the UN Treaty Security Council
PC	People's Court
PCIJ	Permanent Court of International Justice
PCIJ Report	World Court Report
<i>PD</i>	<i>People's Daily</i>
PL	Procuratorate Law
PLA	People's Liberation Army
<i>PAL</i>	<i>Politics and Law</i>
PMA	Protection of Minors Act
PP	People's Procuratorate
<i>PPM</i>	<i>People's Procuratorial Monthly</i>
pp.	from one page to another
PP-China2004	Position Paper of China at the 59 th Session of the UN General Assembly
PP-China2005	Position Paper of the People's Republic of China on the United Nations Reforms
PRHCC	Provisional Regulations of the Supreme People's Court on Procedures for Compensation Committee's Hearing Compensation Cases
PUC	People's University of China
<i>QB</i>	<i>Qingnian Bao</i>
RCHR-CPI	Research Centre for Human Rights, Central Party Institution of CCP
RCHR-PLS	Research Centre for Human Rights, Peking Law School
RCHR-RUC	Research Centre for Human Rights, People's University of China
RCHR-SU	Research Centre for Human Rights, Shandong University
READ	Regulations on Work of Examination and Approval Divisions of RETL

REDP	Rules on Some Issues of Executing the Death Penalty by Shooting (Trial)
RES	resolution
/Res.	resolution
RETL	Reeducation/Rehabilitation Through Labour [Laodong Jiaoyang]
RETLAC	RETL Administrative Committees
RHR-USA	Record on the Human Rights of USA in 2000
RIHRTC	Ratification of International Human Rights Treaties-China
RIWA	Rights and Interests of Women Act
RS	<i>Renmin Sifa</i>
RSICC	Rome Statute of the International Criminal Court
RSR-T	Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
RTE	Reform through Education
RTL	Reform-through-labour (<i>Laodong Gaizao</i>)
RUPIWPP	Regulations on the Use of Police Instruments and Weapons by People's Police in 1996
R-US	A Report Which Distorts Facts and Confuses Right and Wrong--On the Part about China in the 1994 'Human Rights Report' Issued by the U.S. State Department Information Office of the State Council People's Republic
RUSEM-DP	Resolution Urging States to Envisage a Moratorium on the Death Penalty
SACL	South African Constitutional Law
SACCourt	the Constitutional Court of South Africa
SACLR	South African Constitutional Law Reports
Safeguards	Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty
Safeguards1996	Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty(1996/15)
SAR	Special Administrative Regions
SC	United Nations Security Council
SCA	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

<i>SF</i>	<i>Shidai Faxue</i>
SG	United Nations Secretary General
<i>SGA</i>	<i>Senlin Gong'an</i>
SMRTP	Standard Minimum Rules for the Treatment of Prisoners
Southcn	South Net
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
SPRC	Social Policy Research Centre
/SR	Summary records of meetings
SRESAE	Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions
SSFL	Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926
SSJCS	Social Sciences Journal of Colleges of Shanxi
SU	Shandong University
Sub-Com1	Sub-Commission on the Promotion and Protection of Human Rights
Sub-Com2	Sub-Commission on Prevention of Discrimination and Protection of Minorities
TAR	Tibet Autonomous Region
The Charter	the Charter of the United Nations of 26 June 1945
TJC	Tibet Justice Center
TFPAB	Task Force of Prison Administrative Bureau
Vol.	Volume
UCLA-PLS	UCLA Public Law Series
UDHR	Universal Declaration of Human Rights
UMHRL	University of Minnesota Human Rights Library
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNIO	United Nations Information Organisations
UNMIK	United Nations Interim Administration Mission in Kosovo

UNTS	United Nations Treaty Series
US/USA	United States of America
U.S.	U.S. Supreme Court
USSD	US State Department
VCLT	Vienna Convention on the Law of Treaties
WJF	Wei Jingsheng Foundation
WorldLII	World Legal Information Institute
WP	White Papers
WPSW	Washington Post Staff Writer
WUC	Wuhan University Centre for the Protection of Rights of Disadvantaged Citizens
WWII	Second World War
XUAR	Xinjiang Uighur Autonomous Region
ZF	<i>Zhongguo Faxue</i>
ZFS	<i>Zhongguo Faxue Suo</i>
ZGDX	<i>Zhejiang Gongshang Daxue Xuebao</i>
ZRJG	<i>Zuigao Renmin Jianchayuan Gongbao</i>
ZYF	<i>Zhengzhi Yu Falv</i>

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China and International Human Rights: Capital Punishment and Detention for Re-education in the Context of the International Covenant on Civil and Political Rights

GENERAL INTRODUCTION

In support of its application to be elected as a member of the Human Rights Council in May 2006, China made its human rights statement to advocate constructive cooperation and dialogue to promote human rights protection. This shows that China is not irrevocably hostile to the idea of international human rights, though like many other States, it looks for precise statements of the sources of human rights obligations and maintains a vital distinction between the acceptance by a State of international human rights standards and any associated obligations with respect to the implementation of human rights duties. Following China's election to the HRCoun, its representative stressed China's commitment to human rights but in an environment of equality and mutual respect between States, language understood to preserve a large measure of the implementation of human rights within the domestic jurisdiction of States in its statement. China is a party to the International Covenant on Economic, Social and Cultural Rights¹ but has not yet become a party to the ICCPR². China is still exploring what effect acceptance of the ICCPR would have on its domestic practice. This thesis examines this question looking at the use of harsh punishments, capital punishment and detention for re-education, and considers the impact compliance with these standards would have for China.

It is necessary to make two preliminary observations, which explain the object of the thesis and how the investigation has been carried out. This thesis focuses on the 'harshness' of capital punishment and detention for re-education from a human rights perspective. Positively, human rights law attaches special significance to the right to life, the right not to be tortured and the right not to be enslaved, etc., standards concerning which may be contravened by certain forms of harsh

¹ UN Doc. A/RES/2200A (XXI), 993/UNTS/3

² UN Doc. A/RES/2200A (XXI), 999/UNTS/171



penalties authorised by a legal system. Even if imposed after due process, such penalties that violate the rights above could still be regarded as ‘harsh’-the death penalty, penalties which amount to torture or forced labour. In order to establish what these are, it is necessary to investigate the nature of the international standards, considering that there is no human right law expressly proscribing harsh punishments. Negatively, human rights law is inadequately placed to address the proportionality of punishments in general. This kind of ‘harshness’ is not the concern, but punishments which are ‘harsh’ in all circumstances.

Specifically, I am concerned with the imposition of penalties by the State on people convicted of criminal behaviour. It is a necessary condition under human rights law that ANY punishment for a criminal offence be imposed only after conviction following a fair trial, that means, in the case of the ICCPR, a trial which satisfies the standards of Articles 9 and 14. This thesis is not directly concerned with the question of fair trial in China but it is recognized that China is frequently criticised about the state of its criminal justice system, both in general terms and with respect to particular trials. In its latest national report on human rights³, the government puts considerable emphasis on changes made and to be made in support of judicial guarantees for human rights. It may well be that the reform of criminal justice in China is a necessary condition for China’s participation in the ICCPR regime but, looking at the ICCPR as a whole, it will not be sufficient.

It will be argued that, in some circumstances at least, there are aspects of resort to regimes of severe punishment in China which would raise human rights concerns, even if there were reform of the criminal justice system which brought China more in line with the standards of the ICCPR than it is at present. By ‘harsh’ or ‘severe’ punishment I do not intend to mean punishments which are disproportionate to the offence—this is not a thesis on penology—but punishments which impose particularly serious consequences for an offender, even if he might have been convicted of a very serious crime. If the punishments were awarded for some one guilty only of less serious criminal conduct, similar considerations would apply but the question of disproportionality would be an additional criticism to any failures in the imposition of the penalty per se.

³ CHR 3

‘Harsh’ or ‘severe’ punishments—the ones chosen are the imposition of the death penalty and sentence of forced labour under the regime—provide a useful means of studying the relationship between China’s present practice and international standards. The limitations on these kinds of punishment are stronger, less qualified than in certain other human rights protections, so that general conclusions not dependent upon the facts of particular cases are more convincingly reached. Although the proscriptions against the use of such punishments are not absolute, they are far-reaching and justification for using them is much less available to the authorities than the more orthodox penalties like imprisonment. However, the examples chosen are not the only ones which fall within special regimes of human rights—corporal punishment and, increasingly, whole-life term of imprisonment come under similar strict scrutiny.

There is though, a methodological obstacle to carrying out this investigation which applies to almost any aspect of public policy in China. It is the difficulty of obtaining accurate data about official practices, because of control of information by the government, the absence of data, the sheer scale of the Chinese population and the vast differences between practices in some parts of its territory and with respect to some of its people. Wherever possible, Chinese government sources have been used as the initial data for Chinese practice. However, where there are claims which say that actual practice does not accord with government’s accounts, reference will be made to other sources of information, such as the findings of international bodies, the reports of International nongovernmental organisations and the conclusions of foreign governments. Hence, any conclusions about the degree of compliance between China’s present practice and what the international human rights law does or might demand of China are tentative—the actual practice might be more or less compliant. The standards will remain the same and the inquiry about the law would follow the same source as it does here. Even if from a purely formal point of view, that is to say, examining the texts alone, there is evidence that the Chinese legal system does use punishments, which might be ‘harsh’ from the perspective of international human rights law.

This thesis was commenced in 2003 and the punishments to be inquired into were selected then. In November 2005, the United Nations Special Rapporteur on Torture was invited to China by the government. Later he published his report on

China's relevant human rights issues, to which China never respond due to the termination of the Human Rights Committee and its replacement with the HRCoun. As priorities for his inquiries, he mentioned the death penalty and the Reeducation Through Labour system. His choices served to confirm the importance of the matters being investigated in this thesis and confirmed the possibility that useful inquiries may be made, notwithstanding the need to resolve the pervasive problem of the fairness of the criminal justice system in China. China's forceful reaffirmation of its commitment to human rights made as part of its case to be elected to the HRCoun, is also an endorsement that inquiries like those made in this thesis have a practical as well as academic relevance, even if one would be cautious about asserting that academic studies will be a major influence on public policy choices to be made by the government of China.

As there can be such debates about what human rights are, especially as legal rights, States put great importance on establishing what these rights are, whether or not they are binding and how they become binding on States. Even if a State embraces the international human rights project, it is entitled to know what kind of obligations it is taking on in order that it can take effective steps in its domestic law to comply with its international law duties. If States are skeptical about international human rights, it is even more important for them to understand what it is that would be required of a State. China remains one of these, whatever changes there have been.

It is necessary, first of all, to remove misunderstanding and to demonstrate to States that participation in human rights arrangements might not demand as much from them as might have been feared. The death penalty is a good example, as Chapter II shows below. Moreover, consideration of human rights standards might involve that of established domestic practices which have endured simply because there is no national mechanism to review them. One has to recognize, particularly on the question of harsh punishments, that persons subjected to them frequently are unpopular or without power or supporters to make a case for reform. On examination, a State may find that what is an unlawful practice from a human rights point of view is an unnecessary practice from a domestic standpoint.

Equally, one has to concede that examinations of the kind described above may lead to opposite conclusions. They may show to a State that international

human rights obligations would be incompatible with important national values or institutions or might be expensive to implement, for example, improving jail conditions to avoid findings of inhuman treatment. Thus, a State would have given reasons for not accepting the application of human rights standards to it. However, there is also a benefit, in that discussions about human rights with other States or with representatives of international organizations, undertaken at a political rather than a legal level, can proceed to be better informed and less likely to create unnecessary friction between the participants. Hence, studies like this are of great significance to China, whether or not China wants to increase its participation in the international human rights projects.

It is worthy of note that China has special historical experience, traditional culture and current policies, which has a strong influence on China's human rights situation. The above approaches concerning human rights will be explored in detail.

(1) Historical reasons

The historical experience of China appears to inculcate in it a stronger notion of the idea of sovereignty much more than that in the western countries where the idea seems to have originated. The concept is generally interpreted to possess both an internal meaning of a State's supreme power and an external one of non-interference by other States or powers. The external sovereignty played an essential role in Chinese defending national independence against foreign aggression in history, while internal sovereignty has been an obstacle in the international protection of human rights. The Chinese mainstream thought tends to give more emphasis on the general concept of national sovereignty, without a clear distinction between external and internal ones, than individual human rights.

As one of countries with the longest histories in the world, China is called 'Middle Kingdom' in ancient Chinese terms, with the territory of '*tianxia*' or everything under Heaven. As the spokesman of Heaven and dominator of the world, the emperor was considered as '*tianzi*' or the son of heaven, internally, who had the supreme power to issue political orders from the Zhou Dynasty (1050-255 Before Christ). As stated in the Chinese first book of poetry, '*shijing*', all land under the wide-ranging heaven and all servants within the sea-boundaries belong to the King.

Externally, he dominated all of other kingdoms surrounding China in the middle and there is no equality among them. This is basically the closed situation of China for over 2,000 years.

Nonetheless, the first Opium War in 1840, ending with the first unequal treaty of China in its recent history, changed the superior position and closed situation of China. Followed by subsequent foreign invasions, China had to sign a range of such treaties with foreign powers and gave up several aspects of her national sovereignty. Thus, feudal China was totally reduced to a semi-colonial and semi-feudal country, to the detriment of the Chinese populations. In 1931, Japanese invaders initiated a comprehensive war against China, while the Chinese people of all nationalities waged wave of heroic struggles for national independence and liberation during the anti-Japanese war from 1937 to 1945. It is the first completely successful war for national liberation in over 100 years of humiliation.

This period of humiliating history appears to indicate that no human rights without national sovereignty, which always has a deep impression on the Chinese nation and a strong effect on the contemporary Chinese foreign policy of emphasising its sovereignty. The ordinary Chinese also recognise that the US pursues 'human rights with dual aims and standards' and 'essentially uses the issue of human rights as an excuse.....to intervene in other countries' domestic affairs and to advance its own strategic goals'⁴. Hence, China seems to neglect and even resist individual rights in opposing to power politics and hegemonism.

(2) Traditional culture

The human rights awareness, without systematic ideas, can be traced back to the Spring-Autumn period (770-746 B.C.), and emphasises that a State has the duty to promote the welfare of the people in Chinese traditional culture. This is distinct from the Western theory that 'human beings are assumed to have rights not to be violated by the state or government'⁵. It seems to pursue a different approach to realise the common goal of protecting individual rights, without the express statement of human rights.

⁴ Zhou Qi, in *HRQ*/2005/1

⁵ Huang Dansen & Shen Zongling/1995/482

Specifically, as the principle Chinese culture, Confucianism argues 'that the duties of rulers include the authority and right to perform their duties for the benefits of their subjects' with both virtue and duty going hand in hand.⁶ Although rights are one of its central values to 'establish a moral consensus and facilitate beneficial customs within a community', its final purpose is the realisation of political orders and social harmony at all levels.⁷ Both political orders and social harmony tend 'not to protect the individual against the state but to enable the individual to function more effectively to strengthen the state'.⁸

It also provided individuals with community duties, without the definitions of individual rights or what should be returned following their commitment to duties. Mencius' doctrine further stated 'four principles in human relations' on the basis of the good nature of man from the beginning.⁹ 'The feeling of commiseration belongs to all men; so does that of shame and dislike; and that of reverence and respect; and that of approving and disapproving.' It implies 'the principle of benevolence; that of shame and dislike, the principle of righteousness; that of reverence and respect, the principle of propriety; and that of approving and disapproving, the principle of knowledge'. People have to develop them and nourish the nature to maintain pleasant and harmonious inter-personal relationship, as the emperor and his wise ministers practice good governance to promote compatible human relations, a stable State and flourishing world.

In history, China and Chinese families were a combination, which leaves no room for self-determined and independent individuals or political groups as the subjects of human rights. Under the self-supporting agricultural economy, family was the basic way to realise social administration and no person could be an 'individual' in traditional Chinese culture, not mentioning literally individual rights. Together with less intense struggle for power among political entities, it seems unnecessary for ancient China to fix rights in legal forms.

In fact, there was no realistic demand for human rights in ancient China because it was the birthplace of Confucianism, stressing the harmony among and equal rights of individuals that '*sihai jie xiongd*' or 'all within the Four Seas are

⁶ Zhou Qi, in *HRQ/2005/1*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ CHR 8

brothers'. The altruism was also advocated, as '*jisuo buyu wushi yuren*' or 'do not do unto others what you do not like others to do unto you' indicated. Even if potential conflicts appeared, the policy of benevolence and self-cultivation may solve them in any relationships. In such cultural atmosphere, each person, among common people or rulers, is willing to fulfil obligations of loyalty, filial piety, fraternal duty or faithfulness due to their diverse status to reach social harmony. Hence, this profound Chinese culture, which dominated human rights, included altruism, collectivism and various obligations to society and state.

Moreover, criminal law was the only legal department and legal systems were rather imperfect in ancient China, despite that Legalism, born at the same time with Confucianism, advocated severe punishment or 'giving harsher punishment to govern troubled times'. With the strong belief that propriety contributes to governing a country, stabilizing society and regulating people, the Chinese legal consciousness was so poor that the Chinese feared law and hated lawsuit, and even 'would rather starve to death than steal', 'be wronged than go to law'¹⁰.

Therefore, the Chinese cultural tradition helps maintain one's dignity and value and promote social harmony by unique means. This constitutes important components of human rights ideas, though diverse from those underlying international human rights norms.

(3) Current policies

In contemporary China, the basic penal policy is the combination of punishment with leniency, under the guidance of which is a specific one, the policy of 'Strike Hard', which has been practised since 1983. According to the spirit of a Conference on National Social Order and Public Security Work, 'Strike Hard' is defined as activities to give harsher punishments within the range of discretionary action of sentencing and prompt ones within legal limits to crackdown on harsh crimes¹¹. This combined with previous special activities against certain severe crimes or crimes in some fields to strengthen the function of criminal laws and prevent the frequent occurrence of such crimes.¹² It should also consist of the

¹⁰ Ibid.

¹¹ China Court 8

¹² Ibid.

principles of a legally prescribed punishment for a specified crime, equality before criminal laws and commensurate punishment to crime,¹³ whereas the policy appears to deviate from its expected direction in practice for several reasons.

Firstly, economic reforms have brought a profound social transformation to China since 1980s. Conflicts of different ideas on distributive or administrative modes, and increasing dissatisfaction of structural unemployment or reallocating imbalance in the period of social transition appears to result in the poor social order and the increasing tendency of criminal cases. This appears to account for the importance of practicing harsh punishments.

Secondly, the function of harsh punishments to keep crimes within limits has been highly stressed, while human rights of criminal convicts or defendants tend to be neglected. The relationship between punishments and human rights protection appears to be simplified so that the purpose of giving harsh punishments to enemies has been regarded as protecting the innocent and the achievements of punishments might be an assessment criterion of politico-legal work. Considering these problems, 'Strike Hard' seems to be a political task or movement to follow the instant effect of punishments and thus China appears to lack long-term constructive considerations from perspectives of criminology and the science of penal policy in decision-making.

The policy is likely to be abused in every link of criminal proceedings. In investigation, some inquiring officers appear to pursue substantial justice at the price of procedural justice and human rights protection, e.g., collecting evidence by unlawful means or through excessively compulsory measures. During trial, some judges tend to expand the applicable scope of 'Strike Hard' by arbitrary sentences or always give harsher and prompter punishment to such severe crimes as strictly punished only during 'Strike Hard' campaigns, irrespective of the requirements of the policy. In execution, prisoners may be maltreated and their human rights remain to be properly protected.

Moreover, under the influence of 'Strike Hard', the policies of the death penalty, RTL or RETL appear not to be fully practised in some cases. During 'Strike Hard' campaigns, the potency of the death penalty appeared to affect judges

¹³ China Court 9

in some areas who sentenced people to death beyond the intentions of the law.¹⁴ Some courts in these areas also consider the number of executions as an important standard to assess work achievements and extensively apply the death penalty in breach of substantial or procedural laws.¹⁵ This tends to increase miscarriage of justice or human rights violations of persons facing the death penalty. Since numerous executions require sufficient executioners, military policemen have to take part in the course of execution in a shooting approach in some cases to meet the practical need.

Furthermore, during the periods of 'Strike Hard', more offenders seem to undergo RTL or RETL with the extensive application of 'Strike Hard' to criminal cases and the rapid increase of them appears to worsen the situation of inadequate funds. This seems to lead to the phenomenon that such offenders tend to do labour overtime or not to be granted due labour remuneration in some RTL or RETL institutions.

Meanwhile, the basic penal policy is also related to the principle of combining punishment with reform and combining education with labour in RTL¹⁶ and the policy of educating, persuading and redeeming the offenders in RETL. In practice, both the principle and the specific policy appear to be abused with the overemphasis on punishment and labour rather than education, persuasion and redemption. Considering the nature of labour as both a right and obligation of citizens in China, some RTL or RETL institutions tend to deem productive labour of persons undergoing any of them as reform achievements. They are likely to directly bring economic interests and improve material conditions of these institutions. Accordingly, labour time and the quantity of qualified products appear to become the important standard on assessment of whether those persons have been effectively reformed and educated through labour.

This emphasis on punishment and productive labour tends to lead to disregarding the due function of RTL or RETL to educate and reform persons undergoing RTL or RETL. Some of RTL or RETL institutions appear not to take reasonable approaches to educate, persuade and redeem them, but are likely to

¹⁴ Prison

¹⁵ Ibid.

¹⁶ 1994PL Article 3

punish, mistreat and even torture them. Hence, the potential phenomenon of torture, inhuman or degrading treatment in these institutions tends to result from improper work means, rather than the intentional imposition of more suffering itself.

For the purposes of this thesis, a hypothetical figure is imagined, a Chinese official who has a sceptical interest in international human rights. His interest extends to trying to find out what international human rights obligations might mean for China, substantively and in terms of implementation obligations. It is not an attempt to persuade him that China should accept all additional obligations, only to inform him of the legal consequences of doing so. On the basis of the general human rights law theory and China's cooperation, this thesis addresses the death penalty and forced labour in international human rights law, respectively followed by China's practice and policy on both penalties. Since these punishments are covered by obligations to which China may not make a reservation, the harshness of them is the focus of concern in a constructive attempt to explain and to assess Chinese law against, compared say, fair trial or freedom of expression. Therefore, the nature of China's relevant human rights obligations and the distinction between them and its practice could constitute primary contents of successful international human rights dialogue where China should introduce and exchange views and the international community hopes to know and talk with China.

Chapter I THE INTRODUCTION

In the context of international human rights protection, the various national systems of States ‘offer the first line of defence’, and human rights norms and organizations on the international level also play an essential role in this process.¹⁷ Due to the ‘evident inadequacies and gross failures’ of States in observing such norms, and of international organizations ‘in curbing human rights violations’,¹⁸ the gap between these norms and domestic practices ‘becomes strikingly apparent’.¹⁹ Accordingly, the general human rights law theory and China’s cooperation appear to respectively be essential theoretical and practical bases to explore the application of international human rights law to China and further to assess Chinese law.

1.1 A General Theory on International Human Rights Standards

In the light of the general theory of international human rights law, the international protection of human rights comprises setting standards, implementation and enforcement of those standards. Accordingly, the previously mentioned gap between standard-setting and implementation and/or enforcement appears to confirm the limitation of enforcement and thus the importance of cooperation by States bound by human rights obligations. This general theory on international human rights law includes three primary aspects as follows.

1.1.1 Sources of the Law

According to Article 38(1) of the Statute of the International Court of Justice, treaties, customary international laws, and general principles of law are sources of international law. They are also sources of international human rights standards. This process is just the standard-setting on human rights protection.

The international legal system does not have a ‘legislative’ process which can lead to clear establishment of legally binding rules for all States. While it is true that international customary law can produce general standards, there are difficulties in using this process for human rights, and the position of the persistent

¹⁷ Evans2/2003/757

¹⁸ Ibid./762

¹⁹ Ibid./759

objectors can protect a State against being bound by rules to which it strenuously objects.

The treaty-making process, with the same strengths and limitations that it has in other areas of international law, is especially important for human rights. Positively, by treaty, States can set out clear standards and establish means of implementation. Negatively, the binding effect of treaties depends on their acceptance by States and the very States whose participation in human rights treaties might be most required are often the ones most resistant to becoming parties. The resistance of States to compulsory implementation measures has sometimes led to optional protocols setting them up being attached to the treaty containing the substantive standards, a separate ratification being required, for instance, the First Optional Protocol to the ICCPR²⁰. Treaties have a further degree of flexibility and many of them specifically allow or, at least, do not expressly disallow reservations, which have been taken broad advantage of by States.

Acts of organs of international organizations also should be deemed as a source of international law.²¹ Especially, the UN plays an important role in the field of international human rights law and has competences expressly set out in the Charter of the United Nations²², from which some of States' obligations derive. It has also developed a series of 'Charter' mechanisms to supervise States' obligations (see 1.1.2.1.1). Without a general law-making power, however, the UN has a limited capacity to establish binding standards of human rights and its standard-setting need not involve the creation of new legal obligations for States.

1.1.1.1 The Quasi-legislative process

A quasi-legislative process has developed within the human rights bodies of the UN in practice. This course begins with studies by the Sub-Commission on the Promotion and Protection of Human Rights or work by the Commission on Human Rights on the recommendation of the ECOSOC and ends with the eventual submission of texts produced by either of them to the GA.

²⁰ UN Doc. A/RES/2200A (XXI), 999/UNTS/302

²¹ Malanczuk & Akehurst/1997/52

²² 1031/TS/993

There are resolutions, such as the ones on the UN Crime Programme, which, like all GA resolutions, are recommendations to States. These documents are not intended to create binding obligations, but have been used by States to organize their domestic legal and judicial practices, by other international bodies to interpret other international standards, or as crystallization of customary law obligations. They may represent the culmination of the process or be an intermediate stage on the way to the drafting of a treaty. Sometimes, the GA does draft treaties which are attached to GA resolutions, while these treaties are not binding on the UN members as a whole, only on those which choose to ratify them. Only at this stage and when being a party to the treaty does a State become bound by any obligations.

The Charter 'is the first international treaty whose aims are expressly based on universal respect for human rights'.²³ Subsequently, numerous international or regional human rights standards have been formulated to elaborate on international human rights obligations of member States stipulated under the Charter. Despite the Universal Declaration of Human Rights²⁴ being formulated merely 'as a legally non-binding declaration of the GA',²⁵ most of its provisions have 'matured into fully binding rules of customary law'²⁶ or as general principles of law. This important standard is the first and basic statement of the category of human rights in the UN practice, including economic and social rights as well as civil and political rights in the list. Emanating from the UDHR, the ICESCR, ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination²⁷, Convention on the Elimination of All Forms of Discrimination Against Women²⁸, CAT²⁹ and Convention on the Rights of the Child³⁰ appear to constitute the six 'core' human rights treaties in the UN practice, involving both human rights standards and implementation measures. The act of ratification entails international obligations for States, instead of membership of the UN.

1.1.1.2 The Interpretation of human rights standards

²³ Boutros-Ghali/1995/5

²⁴ UN Doc. A/RES/217A (III)

²⁵ Simma/2002/II/925/[26]

²⁶ Ibid./927/[34]; Henkin/1990/19

²⁷ 660/UNTS/195

²⁸ UN Doc. A/RES/34/180

²⁹ UN Doc. A/RES/39/46

³⁰ UN Doc. A/RES/44/25

In view of the uncertain meanings of some human rights norms, the UN has an implied power relating to the standard-setting to define human rights for fulfilment of responsibilities in this area. Apart from literal analysis, the UN practice tends to contribute to the interpretation of basic human rights standards. Moreover, an interpretation accepted by most or all members of the UN over a period of time will become authoritative, as the procedure adopted by the United Nations Security Council has been generally accepted by the UN members and evidences its general practice.³¹

The enunciation of standards by the GA, followed by the practice of States relying on those standards, which is also supported by *opinio juris*, gives rise to a binding obligation to accept the standard as the proper interpretation of the Charter as a 'Constitution Law'. In the UN, this has been markedly the case for the acceptance of the UDHR as the statement of what 'human rights' means in the context of the Charter. However, the matter may go further, such that States regard the UN practice as contributing towards the development of customary law outside the UN. This is made manifest in the following interpretation.

The Charter set out one of the purposes of the UN in Article 1(3) and its obligations as well as those of all member States to promote human rights protection in Articles 55(c) and 56. Article 1(3) provides for its purpose as follows: to 'achieve international cooperation in.....promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. This involves requirements of both Articles 55(c) and 56.

Article 55(c) states that '[W]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples', the UN 'shall promote:.....(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. This specifies the human rights objective reaffirmed in the preamble of the Charter and the relevant objection for both the

³¹ ICJ Reports/1971/22/[22]

UN and its member States to respect and observe as legal obligations and an example of cooperation, which comprises several primary aspects.

The first is the link between ‘stability and well-being’ and ‘peaceful and friendly relations among nations’ in Article 55(c). As the UN repeatedly stressed,³² the former is one of the pre-conditions of the latter. Since the maintenance of peace has also been highlighted to ‘create an opportunity for strengthening international economic cooperation’³³ The peace and economic developments have ‘a dialectic relationship’ as ‘equally important goals’ of the UN practice.³⁴ This interrelationship appears to benefit the need for the UN’s cooperation to handle ‘the underlying economic, social, cultural and humanitarian causes and effects of conflicts in order to promote a durable foundation for peace’,³⁵ involving human rights issues.

The second is ‘respect for the principle of equal rights and self-determination of peoples’ as the basis on which to establish conditions of the first. This entails both principles ‘of equal rights and the self-determination of peoples’ for nations to deal with relations among them, similar to Article 1(2) of the Charter.³⁶ As one requirement of ‘conditions of stability and well-being’, the respect for them is so important as to influence the UN’s functions and even the realisation of its ultimate goals, in spite of their declaratory nature.

Thirdly, the concepts of ‘human rights and fundamental freedoms’ have been applied interchangeable in numerous instruments of the UN, regardless of the diversity of both meanings in literature and the classification of three generations of human rights.³⁷ All human rights have ‘universal, indivisible and interdependent and interrelated’ natures.³⁸ Furthermore, the ‘respect for, and observance of’ them legally oblige the UN member States duties to respect and observe human rights

³² ‘Study on the Relationship Between Disarmament and Development: Report of the Secretary-General’, UN Doc.A/36/356(05/10/1981); ‘Final Document of the Tenth Special Session of the General Assembly’, UN Doc.A/S-10/2(30/06/1978)

³³ Declaration on International Economic Cooperation, in Particular the Revitalization of Economic Growth and Development of the Developing Countries’, UN Doc.A/RES/S-18/3(01/05/1990)

³⁴ Simma/2002/II/902/[10]

³⁵ Ibid.

³⁶ Ibid./[13]

³⁷ Ibid./921-922/[13]

³⁸ ‘Vienna Declaration and Programme of Action’, UN Doc.A/CONF.157/23(12/07/1993)I/[5]

protection from any substantial infringements, the substance of which is defined in conventional or customary international law.³⁹

Fourthly, the non-discrimination clause is clearly established as a conventional and customary international law and considered as a *jus cogens* norm to be directly applicable without further implementation.⁴⁰ Discrimination appears not to be restricted to ‘distinction of any kind such as race, sex, language or religion’, but include all of different treatments without ‘a fair and equal manner’ between individuals, groups or States.⁴¹

The fifth is the principle of universality and effectiveness. The principle of universality means that ‘[A]ll authorities are to respect such rights and all individuals should benefit equally from the protection of human rights’⁴². Its applicable scope is as extensive as to limit reservations in discussing a special clause, or to support the GA’s competence to handle ‘the failure of non-member States to comply with human rights provisions in peace treaties concluded with member States’.⁴³ But it does not exclude the adoption of regional instruments for the protection of human rights, which appears to indicate the human rights relativism as stressed by China and Islamic States.⁴⁴ Meanwhile, the principle of effectiveness is one of the requirements of the ‘observance’ in good faith. This requires ‘collective enforcement measures’ for a good implementation of human rights, and may be ‘regarded as justified subject to narrowly construed condition, provided that a threat to world peace by large-scale human rights violations can be established clearly.’⁴⁵

Moreover, Article 56 states that all members ‘pledge themselves to take a joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.’ As a specification of fulfilling ‘in good faith the obligations’ in Article 2(2), all member States are bound by obligations ‘to take a joint and separate action’ among them to support the UN or to cooperate with it for the purposes stated in Article 55. This cooperation appears to be a legal

³⁹ Simma/2002/II/923/[15]

⁴⁰ Ibid./[17]

⁴¹ ‘Vienna Declaration and Programme of Action’, UN Doc.A/CONF.157/23(12/07/1993)I/[5]

⁴² Simma/2002/II/923/[20]

⁴³ Ibid./924/[20-21]

⁴⁴ Ibid./[22]

⁴⁵ Ibid./[23]

obligation among the member States or between them and the UN, 'functioning through the appropriate organs' in a positive way.⁴⁶

Without limitation on specific forms of cooperation, nonetheless, the concept of cooperation is open to interpretation. Since both States and the UN agencies should have the common interests to maintain peace and human progress, the extent of their cooperation with the UN appears to be read not to breach peace or human rights. According to the UN practice, States seem neither to have obligations to implement the purposes of Article 55 'unilaterally on a national level', nor to 'enact decisions made by the GA' under the Article 56 'nationally'.⁴⁷ Meanwhile, signatories of the Charter are legally obliged to do their best to faithfully amend their legislation and customs to observe the relevant human rights principles as quickly as possible, rather than to eliminate overnight all conflicts. This appears to require member States of the UN to change for the better and stop or prevent systematic human rights violations.

Moreover, both standards and implementation measures followed something of a pattern with respect to the apartheid regime in South Africa, colonial self-determination and the human rights in the development of the UN practice. This has been confirmed in the GA's resolutions, e.g., RES3448 on Chile, the denials of human rights in Democratic Republic of Congo (RES60/172), Iran (RES60/171), Turkmenistan (RES60/172), Uzbekistan (RES60/174) and Myanmar (RES60/233). These resolutions addressed to specific States with increasing frequency refer to States' duty to comply with their treaty obligations on human rights and use the particular treaty obligations of the identified States as standards against which to assess them. In conjunction with the mutual relations of States outside the UN, e.g., protests, representations, pressures, or counter-measures, the essential requirement of 'cooperation' is to prohibit structural breaches of human rights by States.

Hence, the UN members have some substantive obligations to protect human rights, either as an interpretation of the Charter or under customary international law. Specifically, the obligation is to cooperate with the UN, but not to engage in patterns of gross and flagrant violations of human rights.

⁴⁶ Ibid./942/[3]

⁴⁷ Ibid.

Meanwhile, it is worthy of note that the developments in customary law appear not to bring institutional measures of implementation, unlike those in treaties, though possibly increasing inter-State action. But States must accept the above obligation under the Charter to be admitted to membership, which the GA and SC must judge whether they are willing and able to carry out.⁴⁸ Otherwise, the UN is likely to put sanctions on them, e.g. the GA rejecting the representatives' credentials from the Apartheid government of South Africa from 1974 to 1994, though not refusing admission to or proceeding to suspension or expulsion of them on human rights grounds.

1.1.2 Supervising the Law

The supervision or implementation of the human rights law is just what States may have more concern with than standard-setting by the UN. Without a scientific distinction from enforcement, basically, implementation means processes and measures designed to secure States' compliance with human rights obligations, including reporting by them, investigation by UN bodies, assistance and even condemnation. The implementation is cooperative and human rights bodies have no coercive power to implement human rights standards, except by or under the authority of the SC. It is desirable to address this interplay process from both international and national perspectives.

1.1.2.1 International implementation

For the purpose of promoting human rights respect and observance⁴⁹, a range of human rights mechanisms have been set up within the UN to implement its human rights programmes and supervise States' obligations within its competence. They are divided into two categories, namely, Charter-based bodies established under the Charter and treaty-based bodies formed under specific treaties.⁵⁰

1.1.2.1.1 UN Charter-based bodies

⁴⁸ Charter Article 4

⁴⁹ Charter Articles 1(3), 55(c) and 62(2)

⁵⁰ Alston, in Alston/1992/4

The principal Charter-based bodies of human rights structures comprise the GA, SC, ECOSOC, HRC, Sub-Com1, Committee on the Status of Women and Office of the High Commissioner for Human Rights, the United Nations. Since they have powers to implement the UN's human rights programmes and supervise States' obligations within the competence of the UN under the Charter, it is essential to examine the international and internal competences of the UN in human rights areas.

1.1.2.1.1.1 International Competence

Under the Charter, the overall competence of the UN on human rights is not unlimited in pursuit of Articles 1 and 55. Article 56 provides for the extent of human rights duties of all member States, which indicates that States have some competence on human rights and remains a question of the dividing line between the authority of the State and of the UN. It is Article 2(7) that sets a general one between the international competence and the domestic jurisdiction, applicable to all of the UN bodies and their activities.⁵¹

Article 2(7) provides for a 'general principle of non-intervention'⁵² to prevent the UN from intervening in such matters 'essentially within the domestic jurisdiction' of any State. The only exception to this principle is 'the application of enforcement measures under Chapter VII'.⁵³ With ambiguous language and no specification of substantial powers of relevant bodies within the UN, Article 2(7) remains to be interpreted.

In drafting process, the word of 'solely' in Article 2(7) was literally replaced with 'essentially',⁵⁴ in order to reduce the extent of domestic jurisdiction in human rights areas. If 'the matter is not regulated by a rule of customary or contractual international law', or 'if international law does not impose any obligation upon' a State concerning this matter, 'the matter is solely--but never essentially--within the domestic jurisdiction' of the State; and it is solely within the domestic jurisdiction of this State 'by international law'.⁵⁵ The extent of those 'solely' 'within the

⁵¹ ICJ Reports/1950/71

⁵² Jones/1979/224

⁵³ Charter Article 2(7)

⁵⁴ Rajan/1961/80

⁵⁵ Ibid./81

domestic jurisdiction' may be decided by international obligations imposed on States under rules of international law, which seems narrower than that of 'essentially', whereas there is no matter 'essentially' but 'solely', 'within the domestic jurisdiction' in nature.⁵⁶ Hence, the wording of 'essentially' appears to be considered in connection with both the scope of 'domestic jurisdiction' and of 'to intervene' rather than by itself literally.

The concept of 'domestic jurisdiction' can be traced back to Covenant of the League of Nations Article 15 in 1919, without explicitly referring to human rights. Early in 1923, the Permanent Court of International Justice only indicated that it is relative to assess whether a certain matter is solely within the domestic jurisdiction of a State or not in the advisory opinion of *Nationality Decrees* case.⁵⁷ This appears to allow for both States and international organizations to play an important role in developing the contents of 'domestic jurisdiction'. The function of States⁵⁸ in international law seems to ensure their power to 'largely determine which matters are to be regulated by international law'.⁵⁹

Nonetheless, it appears not to be the case with the development of international law relating to human rights. The Charter first includes a range of human rights provisions in 1945,⁶⁰ which is likely to affect the contents of 'domestic jurisdiction'. As evidenced by both substantive practice and judicial authority, the Charter imposes certain human rights obligations on States.⁶¹ Such obligations that a State may have undertaken towards other States 'may reflect customary obligations, treaty obligations or both'.⁶² Accordingly, the development in international human rights law tends to contribute to that human rights protection is a matter that is not regulated 'in principle' by the States.⁶³ This seems not to be inferred that all human rights issues are matters of international law, whereas it appears to diminish the extent of 'domestic jurisdiction' to a certain degree.

⁵⁶ Ibid./78-83

⁵⁷ PCIJ Reports/1923/27

⁵⁸ ICJ Statute Article 38; Schachter/1991/35

⁵⁹ McGoldrick, in Lowe & Warbrick/1994/86

⁶⁰ Russell/1958/777-807, 900-910

⁶¹ Lauterpacht/1968/145-165; Schwelb, in *AJIL*/1972/337-351; Rodley, in *ICLQ*/1989/326

⁶² McGoldrick, in Lowe & Warbrick/1994/86

⁶³ Sieghart, in Reisman & Weston/1976/262-290

Moreover, the UN practice prefers a narrow conception of intervention to reduce the scope of domestic jurisdiction over human rights matters. The range of 'to intervene' is changeable and its parallel development with 'domestic jurisdiction' renders it likely to be interpreted 'in the light of the concept of intervention'.⁶⁴ Discussion of the principle of intervention classically began from the description by Oppenheim.⁶⁵ There is a principle against intervention in an indirect and very limited way in Article 2(7) of the Charter.⁶⁶ Considering the prohibition of the use of force in Article 2(4), the intervention appears to include, but not necessarily to be limited to, the most extreme form.

Both the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty⁶⁷ and Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁶⁸ contain the principle of non-intervention in a broad sense. This tends to indicate that intervention has a wide extent of its potential forms in application and the use of force is only one of them. Apart from confirming that, the *Nicaragua* judgment also emphasized that 'the principle of non-intervention is an autonomous principle of customary law' and that both declarations reflect customary law.⁶⁹ This appears to contribute to a wide interpretation of both intervention and non-intervention, together with 'central purposes of the rule of non-intervention'.⁷⁰

Yet the scope of intervention tends to be restricted by the UN practice, of which some acts may never be intervention, whereas others may be according to how it exercises its powers or might always be but could be specifically authorised by the Charter. Specifically, neither the standard-setting nor the inclusion of an item for discussion can constitute an intervention, as generally accepted by member States as a whole under Articles 1(3) and 55 of the Charter. Even if reaching the intervention level under certain circumstances, discussions on the substantive

⁶⁴ Simma/2002/I/154/[18]

⁶⁵ Jennings & Watts/1992/427-451

⁶⁶ McGoldrick, in Lowe & Warbrick/1994/87

⁶⁷ 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty', UN Doc. A/RES/2131(XX)(21/12/1965)

⁶⁸ 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', UN Doc. A/RES/2625(XXV)(24/10/1970)

⁶⁹ ICJ Reports/1986/107/[205]

⁷⁰ Simma/2002/I/155/[20]

matters and adoption of recommendations are usually not the matters 'essentially within the domestic jurisdiction' of the States under general international law.

Furthermore, that the UN discusses, undertakes a study of or makes investigations into, and recommends on, the human rights situation in a specific State, seems to amount to an intervention. But it is not the case if the UN has related competence and such matters lie outside the domestic jurisdiction of the State. The HRC usually investigates the position in an individual State, finds evidence on, and condemns, the non-compliance with its human rights obligations. Many States still have reservations about the legitimacy of this and claim their domestic jurisdiction, while the UN maintains the international concern of this matter, has investigated some States and reached adverse conclusions about them. Neither view can prevail simply by the above assertions, but largely resting on what action the UN is contemplating.

Apparently, these human rights duties imposed on States appear to indicate human rights issues more within both international competence and domestic jurisdiction, than outside their domestic jurisdiction. If States are willing to give up their jurisdiction over human rights matters, then such issues fall into the category of 'essentially' outside their domestic jurisdiction and within the UN competence at the same time. Hence, this tends not to amount to an intervention and the above investigation appears to be an intervention without States' permission or invitation.

However, there is a development of rules on the above human rights issues in the UN practice. GA Resolution 2144 (XXI), ECOSOC Resolutions 728F (XXVIII), 1164 (XLI) and 1235 (XLII) as well as HRC Resolution 8 (XXIII) share the same legal opinion.⁷¹ It supports the UN to undertake fact-finding and investigations where there is some evidence of 'gross violations' and 'consistent patterns of violations', with essential elements of seriousness, time and repetition.⁷² Even if the methods of fact-finding or investigations constitute an intervention, such violations with reliable evidence are no longer regarded as falling 'essentially within the domestic jurisdiction'. Its special significance inevitably puts into question the whole conduct of government policies and even its capacity to survive, which appears to partially explain the sensitivity of States.

⁷¹ Nowak, in *NYIL*/1991/86

⁷² *Ibid.*/85-86

In fact, if a State agrees to cooperate with the UN, for instance, South Africa's invitation to the UN to send observers, then no issue of domestic jurisdiction occurs. But the UN has no legal obligation to respond to every request, which appears consistent with the intention to draft the Charter of abandoning 'the possibility of useful action rather than' sacrificing 'the balance of carefully established fields of competence'.⁷³

It is increasingly accepted that the principle of non-interference with the essential domestic jurisdiction clause cannot prevent any State responsible for systematic human rights violations from condemnation by UN bodies.⁷⁴ Even if a State which is under UN investigation is a party to other international human rights treaties, those obligations appear not to remove human rights matters from the State's domestic jurisdiction for the purposes of Article 2(7) in general, either.

Yet 'the more cohesive and authoritative' European Convention for the Protection of Human Rights and Fundamental Freedoms 'may effectively displace the universal system for many disputes generated' within its members States.⁷⁵ Although most of them are parties to UN human rights treaties, they often bring disputes before the European Court of Human Rights. While the UN bodies (Human Rights Committee etc.) are competent to settle these disputes, its universal system has been reinforced with the more effective ECHR in the above case.

Moreover, where the SC recommends or requires measures against a State that is not complying with its decisions under Chapter VII of the Charter does not constitute an intervention. Under Article 2(7), 'a threat to or breaches of peace or acts of aggression defined in Chapter VII of the Charter' clearly falls outside the domestic jurisdiction and inside the international competence, regardless of constituting human rights violations.

Since the above peace means international peace, the doctrine of 'international concern' appears. It seems to immediately make available 'the procedures of pacific settlement' and resort to the UN jurisdiction with present or 'potential threats to the peace' 'even if a party raised the plea of domestic jurisdiction'.⁷⁶ Nonetheless, a 'threat to international peace could exist only when the territorial

⁷³ ICJ Reports/1962/230

⁷⁴ Nowak, in *NYIL*/1991/85

⁷⁵ Evans2/2003/772

⁷⁶ Howell, in *AJIL*/1969/776

integrity or political independence of a State was threatened directly or indirectly.'

⁷⁷ Considering this doctrine has 'boot-strapping' operation in the progress of the UN standards and the political concept of 'international concern' is different from the UN's competence as a legal notion, less situation of being of 'international concern' may fall under such competence.

The GA is competent to recommend Member States to take various kinds of action against a member State in its resolutions.⁷⁸ However, the power of the GA is limited under Chapter IV and it cannot recommend some kinds of measures, e.g., military measures, which would not be consistent with its powers. Even if the actions within its competence seem to amount to an intervention, such resolutions have the constitutional basis that matters in 'flagrant breaches of human rights' are not essentially within the domestic jurisdiction of related States and thus fall into the UN jurisdiction.

Meanwhile, the UN practice limits the extent of 'domestic jurisdiction' in applying Articles 55 and 56 of the Charter⁷⁹ and a narrow conception of intervention appears to decrease this extent. In the *Nationality Decrees* Case, the PCIJ 'is of opinion that the dispute referred to in the resolution of the League of Nations Council of 4th October 1922, is not, by international law, solely a matter of domestic jurisdiction'.⁸⁰ On the basis of this reasoning, States and UN organs recognized a substantial reduction of the area of 'domestic jurisdiction'.⁸¹ Thus, a State may retain 'domestic jurisdiction' within a less scope with more international obligations under treaties, customs, or general rules of law. Where it becomes a member of the UN, its scope of 'domestic jurisdiction' will be limited by any treaty obligations it has accepted under the Charter.

Generally, human rights issues are a concern of the UN and for all global actors, which appears to indicate that human rights are within the 'concurrent

⁷⁷ Zoller, in *AJIL*/1987/610

⁷⁸ 'Question of the Violation of Human Rights and Fundamental Freedoms, Including Policies of Racial Discrimination and Segregation and of Apartheid, In All Countries, With Particular Reference to Colonial and Other Dependent Countries and Territories', UN Doc.A/RES/2144[A](26/10/1966); 'National Institutions for the Promotion and Protection of Human Rights', UN Doc.A/RES/3449(XXX)(23/11/1979); 'Situation of Human Rights in the Islamic Republic of Iran', UN Doc.A/RES/43/137(08/12/1988); 'Situation of Human Rights in Iraq', UN Doc. A/RES/46/134(17/12/1991)

⁷⁹ Brownlie/1990/291, 254

⁸⁰ PCIJ Reports/1923/161-162

⁸¹ Simma/2002/I/160/[36]

jurisdiction' of the UN and States,⁸² rather than an 'essential' part of their domestic jurisdiction. But not all States are equally bound by certain but not all human rights because the legal effect of human rights laws on States is diverse. The UN is competent to draft human rights standards, either resolutions of the GA without binding force, or treaties with legal effect merely on State parties, while each State can decide whether to ratify treaties or not. Also the ICJ referred to obligations *erga omnes*, which includes the principles and rules concerning the basic human rights among *jus cogens* or customary international law.⁸³

Moreover, human rights bodies of the UN are authorised to 'only examine the results of its implementation', instead of 'the power to recommend to a country that it should implement' the ICCPR 'in one way or the other'.⁸⁴ This allows the State to exercise its discretionary power to decide specific implementation measures and practice them to enforce relevant human rights standards in fulfilling its obligations,⁸⁵ which amounts to a part of its domestic jurisdiction.

Additionally, both States and the UN agencies have the power to determine whether or not an issue on human rights abuses was 'essentially within the domestic jurisdiction' of States. The UN organs are competent to assess the application of a particular norm, without 'a determinative say',⁸⁶ whereas the UN practice, the acceptance or acquiescence by other States and the position of the State concerned tend to influence such a valid evaluation. Moreover, Article 2(7) of the Charter 'necessitates a positivistic treatment and a continuing need to base any modification...on the clear consent' of States as 'the legal expression of the continuing political fact of sovereignty' in a sense.⁸⁷ This requires 'clear consent' of States and emphasizes their power to make decisions.

In summary, Article 2(7) of the Charter has proved a flexible protection for State autonomy or the domestic jurisdiction of members against intervention by the UN, within their limited duty of co-operation in Article 56. Two things seem to be

⁸² Nowak, in *NYIL*/1991/86

⁸³ ICJ Reports/1970/33/[33-34]; ICJ Reports/1980/42/[91]

⁸⁴ 'Summary Record of the Second Part(Public) of the 43rd Meeting', UN Doc.E/C.12/1998/SR.43/Add.1(27/11/1998)

⁸⁵ Report of the SG, 'Strengthening of United Nations Action in the Field of Human Rights through the Promotion of International Cooperation and the Importance of Non-Selectivity, Impartiality and Objectivity', UN Doc.E/CN.4/1993/30(18/12/1993)6(b)/Mexico

⁸⁶ ICJ Reports/1962/168

⁸⁷ Watson, in *AJIL*/1977/66

agreed, of which it is not an intervention for the UN to discuss and even reach conclusions on matters involving an individual State which are governed by international law. Such matters are not within a State's domestic jurisdiction. The other is that the UN's entry into the territory of a member State, even in connection with a matter governed by international law, is always an intervention, except with the authority of the SC. So for human rights, the UN can discuss and reach conclusions about whether or not there is a pattern of gross and flagrant violations of human rights in a member State but cannot within the State, without the consent of the government. This consent is frequently withheld and often made subject to stringent conditions. If the UN feels able to reach conclusions without entering the territory of a State, for instance, by relying on the evidence of persons who have fled the State, then it may reach its conclusions, though these will be only recommendations. If a State does co-operate with a UN mechanism, for example, by allowing in a Special Rapporteur, any conclusions he reaches will also be without binding effect but it may be difficult for a State not to engage with the Special Rapporteur about how to proceed.

1.1.2.1.1.2 Internal Competence

Distinct from the UN competence against the States, there is an issue on the internal competence of the UN, namely, which organ within the UN is competent to handle the matter. There are various bodies with potential competence on human rights because some of the principal organs of the UN, such as the GA, SC and ECOSOC, have the power to create subsidiary organs under Articles 7(2), 22, 29, and 68. The HRC, Sub-Com1, ComSW and OHCHR also play an important role in dealing with these issues as subsidiaries of the UN.

1.1.2.1.1.2.1 Power competence

One factor relevant to the international competence is the power of decision of the organ. The Charter bodies may have diverse powers on human rights matters, of which every human rights body within the UN might put forward some human rights issues in general. Both the GA and ECOSOC exercise a wide extent of internal competence to discuss human rights matters in application of the UN's

general international jurisdiction respectively under Article 10 and 62 of the Charter. Then, relevant decisions could be made by the GA, HRC or SC under Article 12, among which organs may only act by way of recommendations, with the exception of the decisions made by the SC under Chapter VII of the Charter.

Specifically, the SC may take decisions which are binding on States under Articles 25 and 27(3) and which take priority over their other treaty obligations under Article 103, if there is an identified 'threat to the peace, breach of the peace or act of aggression'. It can 'investigate any dispute, or any situation which might lead to international friction or give rise to a dispute', including those concerned with human rights violations under Article 34. After that, it may 'determine' whether human rights violations are serious enough to constitute a 'threat to the peace' under Article 39 of the Charter and 'has the final voice' in handling such matters. Its legally-binding decisions under Article 25 and Chapter VII are distinct from legal recommendations made by the GA or ECOSOC without binding force under Chapter IV or Chapter X of the Charter. Nonetheless, its extensive power is not unlimited under Article 39 because all measures that it shall decide to take according to Articles 41 and 42 must be favourable 'to maintain or restore international peace and security'.

Charter Article 13(1)(b) mandates the GA to 'initiate studies and make recommendations for the purpose of...assisting in the realization of human rights and fundamental freedoms for all without distinction'. This appears to indicate three phrases in its human rights activities, that is, standard-setting, promotion and protection.⁸⁸ The standards mainly appear in the forms of conventions, declarations, recommendations and resolutions. Promotion refers to 'advisory services, broad studies, and an incipient reporting system'⁸⁹. Protection primarily involves 'establishment of procedures for assessing information received from private persons and groups concerning possible gross violations and reporting thereon to the general membership, fact-finding in certain cases' where member States 'allege grave violations, and efforts to mitigate or terminate violations in particular

⁸⁸ Farer & Gaer, in Roberts & Kingsbury/1993/269

⁸⁹ Ibid.

cases'.⁹⁰ Apart from standard-setting, it has already done much of 'the pioneering work of establishing machinery to protect and promote civil and political rights'.⁹¹

Article 62 mandates the ECOSOC to undertake studies and make recommendations on a wide range of issues, encompassing 'respect for, and observance of, human rights'. It also set significant international human rights standards as a subordinate body.

The HRC was set up by the ECOSOC as a specialized commission with 'the mandate of submitting proposals, recommendations and reports' to the ECOSOC concerning human rights in 1946 under Article 68.⁹² Its standard-setting is a vital part of the drafting process of the UN prior to the GA's approval and then States' ratification.⁹³ This is overshadowed by its responding to claims of substantial human rights violations from 1967, while it also has the 're-conceived power of discussion, debate and passage of critical resolutions to a growing number of States'.⁹⁴

It approved the creations of the Sub-Com1 and the ComSW. The Sub-Com1 has the power to 'undertake studies...and to make recommendations' to the HRC 'concerning the prevention of discrimination of any kind relating to human rights'.⁹⁵ The ComSW was established as a body of the ECOSOC by its Resolution 11(II) of 21 June 1946 to 'prepare recommendations and reports....on promoting women's rights in political, economic, social and educational fields' or 'on urgent problems'.

In addition, the OHCHR is 'the UN official with principal responsibility for human rights' under the United Nations Secretary General within the Secretariat.⁹⁶ By ECOSOC Resolution 728F in 1959, the ECOSOC developed such a procedure that allows the SG to compile a non-confidential list of complaints which dealt with the principles of human rights protection. The OHCHR also has the power to mediate directly with governments where there is evidence of human rights abuses,

⁹⁰ Ibid.

⁹¹ Quinn, in Alston/1992/105-106

⁹² Boutros-Ghali/1995/14

⁹³ Evans2/2003/764

⁹⁴ Ibid.

⁹⁵ Boutros-Ghali/1995/17

⁹⁶ Evans2/2003/769

⁹⁷ but its functions have been seriously handicapped by a shortage of staff and funds.

1.1.2.1.1.2.2 The Charter mechanisms

While member States have generally accepted the UN competence on human rights standard-setting, a substantial number of States always regard implementation as a matter of domestic jurisdiction. They claim that the UN's activities within a State require its consent and any adverse conclusions without 'on-site' investigation on it are unconvincing. But the UN has developed the Charter mechanisms with subjects on 'general situations of human rights violations in a given country'⁹⁸ and these procedures have reached convincing conclusions in some cases, even if no access to the territory. They comprise 1235 procedure, 1503 procedure, country-oriented and thematic resolutions, in order to decide whether a situation reveals patterns of gross human rights violations.⁹⁹ Among them, the 1235 procedure is concerned with States and 1503 procedure with individuals, while country-oriented resolutions are taken in the country-by-country approach and thematic ones by thematic means.

ECOSOC Resolution 1235 (XLII) of 1967 introduced authorization of a public procedure applicable to individual States on human rights matters. It endorsed the HRC's decision to hold an annual debate on human rights breaches in terms which envisaged consideration of general situations in States. The procedure also mandates both the HRC and Sub-Com1 to 'examine information relevant to gross violations of human rights'. Since its activation depends upon States' decisions to initiate it against a particular State, this is likely not to make the co-operation of the target State with patent political considerations. Even if States cooperate with the UN, this procedure ends with condemnatory recommendations in the HRC's resolutions.

ECOSOC Resolution 1503 (XLVIII) of 1970 authorised a confidential procedure as 'the oldest human rights complaint mechanism in the UN system'¹⁰⁰.

⁹⁷ 'High Commissioner for the Promotion and Protection of All Human Rights', UN Doc.A/RES/48/141(20/12/1993)

⁹⁸ Nowak, in *NYIL*/1991/86

⁹⁹ *Ibid.*/86-89

¹⁰⁰ OHCHR 3

By this resolution, ECOSOC only authorised the Sub-Com1 to set up a working group to consider all communications received by the SG and any government comments on 'a consistent pattern of gross...violations of human rights'. For example, allegations made against Greece and against Haiti were both considered under this authority and further taken by the ECOSOC according to the ECOSOC Resolution as implemented by the Sub-Com1.

The 1503 procedure was substantively revised by ECOSOC Resolution 2000/3, which provides more time for consideration of complaints and the power of the HRC to consider whether situations referred from the Sub-Com1 may initiate a study or not. The Sub-Com1 works according to Resolution 1 of 1971, which stipulates the criteria of admissibility of communications in this entirely confidential procedure. The process is finalized with a list of the situations, the consideration underway of which has been discontinued. Thus, this procedure appears 'to make it more efficient, to facilitate dialogue with the Governments concerned and to provide for a more meaningful debate in the final stages of a complaint' before the HRC.¹⁰¹

Nonetheless, there is the limitation on admissibility of communications under Resolution 1. Such communications aim to provide evidence of a 'consistent pattern of gross and reliably attested violations' and the remedy is directed to this general situation rather than urgent protection measures to relieve victims.

Considering the need to establish evidence of patterns of human rights breaches instead of the seriousness of individual cases, NGOs play an important role in both procedures. Systematic human rights abuses enshrined in the UDHR principally constitute such patterns of violations and the most prominent examples of such abuses include 'torture, summary executions...genocide, slavery-like practice and...discrimination' in practice.¹⁰² The HRC or ECOSOC may appoint Special Rapporteurs to investigate further the situation in specific States. The Sub-Com1 may decide whether a particular situation amounts to such evidence, 'on an ad hoc basis',¹⁰³ in the confidential procedure. 'Every formal decision to put a particular country on the agenda item 12' of the HRC item 7 of the Sub-Com1, or

¹⁰¹ Ibid.; 'Procedure for Dealing with Communications concerning Human Rights', UN Doc.E/RES/2000/3

¹⁰² Nowak, in *NYIL*/1991/86

¹⁰³ Ibid.

to adopt 'a resolution deploring the situation in that country' indicates information available on gross human rights violations in the public procedure.¹⁰⁴

The HRC also adopted Country-oriented resolutions on the right to self-determination to imply human rights violations, while such resolutions under 'advisory services' do not indicate the existence of systematic breaches, but certain problems.¹⁰⁵ After an examination under ECOSOC Resolutions 1235 or 1503, advisory services are usually requested by governments on the way back to democracy and sometimes abused by them in an attempt to escape an examination under supervising proceedings.¹⁰⁶ This has been severely criticised by the Amnesty International as concealing large-scale human rights violations and that the value of such resolutions depends upon the reaction of the HRC to a great degree. Country-situations may be referred to the GA and it may pass resolutions relating to them, for instance, the HRC took action on five country-specific resolutions in 2003, which is largely related to violations of civil and political rights in African or Asian States.

Different from others, thematic mechanisms require the appointment of issue-specific rapporteurs to respond quickly to urgent cases or emergencies in individual States. Since 1980 such mechanisms have developed enormously with appointments on various themes, some of which are individual rapporteurs or working groups. The HRC has appointed many thematic rapporteurs or working groups, some of whose mandates overlap with the country rapporteurs. Any visits of both rapporteurs require the consent of the State and may be carried out only on the conditions agreed.

1.1.2.1.1.2.3 The political nature of the Charter procedures

Since the procedures of the Charter involve the UN's competence under the Charter, States' rights and obligations under the Charter and customary international law, the implementation of human rights law requires the co-operation of States. Most human rights bodies within the UN are political bodies composed of government representatives and political factors tend to influence

¹⁰⁴ Ibid./87

¹⁰⁵ Ibid./88

¹⁰⁶ Ibid.

their decision-making, e.g. the first use of ‘no action’ procedure by GA in 2004. Independent experts in Sub-Com1 simply play the role of providing information to the HRC that determines the target States and reach conclusions from experts’ reports. Even if both transparency and procedural fairness are available in such processes, States’ responses appear wary and the UN bodies’ condemnatory resolutions are co-operative.

Moreover, the circumstance where there is evidence of a pattern of structural human rights breaches and the UN has the greatest competence usually arises not against the will of governments. For instance, it is the policies that may lead to this pattern because of political necessity or a political commitment to a programme of human rights violations. This leaves room for the UN to develop cooperative programmes with States where the human rights situation is not bad or the government has not the risk of survival or preemption of their essential policies with their cooperation.

1.1.2.1.1.2.4 The UN reform

The HRCoun has been established to replace the HRC from 16 June 2006 as a subsidiary body of the GA.¹⁰⁷ Its focus is to promote ‘the full implementation of human rights obligations’ by member States through ‘dialogue on thematic issues’, ‘human rights education and learning, advisory services, technical assistance and capacity-building’, and to make recommendations to the GA ‘for further development of international law in the field of human rights’.¹⁰⁸

The HRCoun carries over ‘all mandates, mechanisms, functions and responsibilities of’ the HRC without any gap on human rights protection, including those concerning the work of the OHCHR and in close cooperation with various human rights organizations.¹⁰⁹ The HRCoun ‘shall meet regularly throughout the year and schedule no fewer than three sessions per year’ and ‘hold special sessions, when needed, at the request’ of a HRCoun member ‘with the support of one-third of the membership’ of the HRCoun.¹¹⁰

¹⁰⁷ ‘Human Rights Council’, UN Doc.A/RES/60/251[1]

¹⁰⁸ *Ibid.*/[5]

¹⁰⁹ *Ibid.*/[5-6]

¹¹⁰ *Ibid.*/[10]

The HRCoun consists of 47 member States and its membership is open to all members of the UN.¹¹¹ The members of the HRCoun are expected to ‘uphold the highest standards in the promotion and protection of human rights’ and ‘fully cooperate with’ the HRCoun.¹¹² In order to ensure its members to observe these human rights standards, they will ‘be reviewed under the universal periodic review mechanism during their term of membership’.¹¹³ The GA may ‘suspend the rights of membership’ in the HRCoun of a member of the HRCoun that ‘commits gross and systematic violations of human rights’.¹¹⁴

Considering the above reform of the UN, the establishment of the HRCoun has been recognized as ‘a historic opportunity to improve the protection and promotion of fundamental freedoms of people around the world’.¹¹⁵ Both advantages and disadvantages of the UN reform would be witnessed by the potential contribution of the HRCoun to the further development of international human rights law.

1.1.2.1.2 UN treaty-based bodies

Each international human rights treaty has its own implementation procedures. There are six human rights treaties to be implemented by a treaty body whose task is confined to matters arising from that treaty: the ICCPR, ICESCR, CEDAW, CAT, CERD, or CRC. The HRCCom established by ICCPR Article 28 is the most significant among the six treaty bodies and composed of 18 independent experts who impartially work ‘in their personal capacity’. Its primary functions characterize six treaty bodies as a group.

ICCPR Article 40 requires parties to ‘submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights’, which is a reporting system. The reports include ‘the factors and difficulties...affecting the implementation’ of the ICCPR, which should be a realistic picture of the application of human rights norms to a State and its conducts related to enforcement. In public proceedings, for instance,

¹¹¹ Ibid./[7-8]

¹¹² Ibid./[9]

¹¹³ Ibid.

¹¹⁴ Ibid./[8]

¹¹⁵ OHCHR 4

occasional dialogues between the State and the HRCCom, a formal presentation by the State, or informal involvement by the NGOs, State reports are discussed with a State's representative in attendance. The HRCCom responds to States with 'concluding observance' that may be open for the media or NGOs' reports or a heated debates.

Moreover, the HRCCom generally gives substantive interpretations of treaty provisions on diverse topics in General Comments issued by it, excluding participation of treaty parties. There is also the individual communication in optional clauses or protocols of several international human rights treaties. The OPI-ICCPR provides a complaints system against a State party and for all citizens of the State to access and invoke. Certain conditions must be satisfied and these include the exhaustion of local remedies. The approach of communication is written or close examination.

In summary, treaty bodies have evolved in important ways through internal decisions, all of which appear to expand the power to secure universal human rights observance pursuant to international human rights treaties.

1.1.2.2 National implementation

In general, 'most international agreements on human rights leave the question of implementation' to State parties¹¹⁶ on the national level. Under the Charter, all member States have a general obligation on international human rights cooperation, which obliges them to cooperate with the UN, but not to engage in patterns of gross and flagrant violations of human rights, as noted above. This is related to all aspects of implementation or supervision at national level, mainly including the necessary legislative, judicial and administrative measures as requirements of human rights protection.

Main human rights treaties expressly state requirements and even essential measures to protect human rights in general or specific, e.g. the ICCPR. ICCPR Article 2 requires or obliges State parties to respect and ensure that individuals' rights recognized in the ICCPR are implemented through incorporation in domestic legislation or through other approaches. First, if a State party has not 'already provided for by existing legislative or other measures', it must 'take the necessary

¹¹⁶ Meron/1984/369-370

steps...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized' therein.¹¹⁷ Second, it has the duty to 'ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'.¹¹⁸ Third, it shall 'develop the possibilities of judicial remedy' to 'ensure that any person claiming such a remedy shall have his right' recognised.¹¹⁹ Similarly, some of other international human rights instruments contain rather detailed provisions to impose on State parties this kind of obligations.¹²⁰

Accordingly, the national legislation should recognize the legal scope and systems to protect human rights, judicial bodies shall undertake to offer judicial remedy to ensure human rights, administrative authorities take measures to prevent violations of human rights. Among them, judicial bodies play an important role in national implementation of human rights standards because the national courts may interpret such standards to effectively remove possible obstacles to judicial remedy and human rights protection.

In theory, there are two approaches, self-executing and non-self-executing, in application of international norms, including human rights standards. Where provisions relating to human rights are clear and explicit, they could be deemed self-executing to be directly applied. Otherwise, they could be applicable to domestic cases after the national legislature had domesticated them and made them have legal effects on the national legislation. Where there are legal conflicts between domestic legislation and international human rights instruments, it is vital for the competent national courts to give judicial explanations of the specific use of nationwide laws in the judicial process. This exercise of their legal function appears to favour reducing and removing possible divergence between them.

In addition, other national bodies, e.g. human rights commissions, retain to be established or improved. They are responsible for monitoring, documenting, or reporting human rights issues, in general, to promote progress of the domestic human rights situation.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid./371

1.1.3 Enforcement of the Law

1.1.3.1 International enforcement

At the international level, the SC appears to be playing a limited role in enforcing international human rights instruments without express power to take action for human rights protection. Less effective means to enforce decisions of the SC appear to hamper its handling of such matters and even lead to combing ‘appeals to do better in the future with denunciation of past failures’¹²¹.

1.1.3.1.1 The SC’s powers

Under the Charter, the SC has no specific power to enforce international law generally or human rights law particularly. Since the SC has the power to determine ‘the existence of any threat to’ or ‘breach of the peace’ and take measures on it under Article 39, it must determine that human rights violations amount to a threat to or breach of the peace in order to take action under the Chapter. In the UN practice, the GA has long acted on the basis that widespread breaches of human rights do threaten international protection of peace and security. The SC has frequently acted under Chapter VII in situations where human rights consideration has become so predominant or substantial as to threaten international peace.

As Article 39 requires, the SC’s determination of ‘what measures shall be taken’ should ‘maintain or restore international peace and security’, to the degree of which are directed against human rights violations. Such decisions on human rights matters under Article 27(3) are binding under Article 25 on all of member States, comprising any specific addressee States, and take priority over States’ other treaty obligations under Article 103.

1.1.3.1.2 The SC practice

The SC has taken a series of measures to maintain international peace and protect human rights, among which economic measures, resort to international criminal

¹²¹ Bailey, in Alston/1992/332

tribunals or armed force are important and effective means in practice. Two prime examples of economic measures are Rhodesia and South Africa, where in accordance respectively with Resolutions 232 and 418. Another one is Iraq where economic sanctions have the effect of 'oil for food' according to Resolution 986. As Article 50 stipulated, any other States, regardless of the UN members, 'confronted with special economic problems arising from the carrying out of' the SC's 'preventive or enforcement measures' against any State have the right to resort to its resolution of such problems. This indicates the effect of economic means on third States.

The SC has established the International Criminal Tribunal for the Former Yugoslavia in former Yugoslavia under Resolutions 808 and 827 and the International Criminal Tribunal for Rwanda in Rwanda under Resolution 955. They have jurisdiction over such grave crimes committed in former Yugoslavia and in Rwanda and are mandated to prosecute those who are responsible for such crimes.

As the last resort, the use of force is an effective measure taken by the SC. The most prime examples are Somalia, Bosnia and Kosovo, where respectively in accordance with Resolutions 794, 1035 and 1244 as follows. The SC Resolution 794 determined 'magnitude of human tragedy...exacerbated by obstacles to distribution of humanitarian assistance constitutes a threat to international peace and security' and authorised States to use 'all necessary means' to establish a secure environment for humanitarian relief operations. The SC Resolution 1035 decided that 'the situation in the region continues to constitute a threat to international peace and security' and authorised States to take 'all necessary measures' to implement Dayton. The SC Resolution 1244 made the same decision with and different authorizations from its Resolution 1035. Resolution 1244 authorised States 'to establish the international security presence' with 'all necessary means' to fulfil its mandate [Kosovo Force], and the SG 'to establish an international civil presence' 'to provide transitional administration while establishing and overseeing the development of provisional democratic governing institutions'. This is also required to reach the degree of 'protecting and promoting human rights' [United Nations Interim Administration Mission in Kosovo] and

ensuring 'a peaceful and normal life for all inhabitants of Kosovo' under this resolution.

The UN may take on a temporary, albeit not necessarily short, role of governments of States and territories, e.g. Namibia, East Timor/Timor-Leste, Afghanistan, Sierra Leone, with the military force supplied by States to protect the civil operations of the UN body. When exercising enforcement powers for human rights purposes, the UN body expresses some measures of concern about the effects of sanctions on civilian populations, e.g. in Iraq. Its concern also includes compliance with human rights standards by UN staff, e.g. relating to Sierra Leone, and by members of authorised forces, e.g. Somalia, Afghanistan.

During the peace-building of post-conflict, there is a problem of whether the intervention is by a universal force or by a force authorised by the SC. The single model for the relationship between the political and military elements of this process is not available, but the legitimacy of the political part of the operation. It is important because this legitimacy appears to contribute to the transference of the security aspects from an external military apparatus to an internal police force.

1.1.3.2 National enforcement

At national level, there are two primary points to be noted in enforcement, that is, the *erga omnes* nature of human rights obligations against third-States and enforcement of domestic laws relating to human rights by the national courts within local State.

1.1.3.2.1 Obligations *Erga Omnes*

Some of human rights obligations have universal effects with *erga omnes* nature. This may be demonstrated from the standing point of a general theory of obligations *erga omnes*.

It is 'widely acknowledged today' that obligations *erga omnes* are important State responsibilities,¹²² distinct from those arising from essentially bilateral relations between the defendant and the injured States,¹²³ under general

¹²² Tams/2005/2

¹²³ Ibid./3

international law¹²⁴. The ICJ stated that they were 'obligations of a State towards the international community as a whole...By their very nature...the concern of all States...all States can be held to have a legal interest in their protection' in the *Barcelona Traction* Judgment.¹²⁵ This tends to describe their nature and distinguish them from the other State responsibility existing in ordinary bilateral relationships under international law.

The ordinary legal relationship mentioned above is between two States, namely both the responsible and the injured State, irrespective of whether customary law or bilateral or multilateral treaty is the source of the obligation. For example, under customary international law, a State has a series of *bilateral* obligations to treat aliens on its territory according to the international minimum standard in parallel to all others. Accordingly, only the injured State may make a legal claim or take further action against the responsible State that fails to make restitution for its wrongful acts. Equally, under multilateral treaties, for instance, the European Convention on Extradition, if one party (State A) refuses to extradite a person to another party (State B), only State B may complain or respond by not returning persons to State A in breach of its corresponding treaty obligations.

In stark contrast to this orthodox one, the new category of legal relationships of State responsibility derived from obligations *erga omnes* merely involves the responsible State, rather than the injured State, under international law. There is a noticeable limitation to this legal relationship for the demonstration of damage by the responsible State. This disadvantage is acute for human rights obligations due to lack of materially injured States or an effective mechanism to secure a State that injures its own nationals to comply with its relevant obligations.

Moreover, the ICJ gave some examples of the substantive rules which were of the character of *erga omnes* in order to add an explanation on its nature, despite there being no substance to such obligations. They consist of 'contemporary international law', for example, 'the outlawing of acts of aggression, and of genocide', and 'the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination'.¹²⁶ This appears

¹²⁴ ICJ-Reports/1970/32/[34]

¹²⁵ Ibid./[33]

¹²⁶ Ibid./[34]

to mainly concern core human rights obligations with the nature of *erga omnes*, while not providing a precise mechanism for identifying which rules have this nature.

In summary, obligations *erga omnes* include the obligations of all States concerned to outlaw acts of widespread or systematic atrocities, or to protect the basic rights of people and are owed 'towards the international community as a whole'¹²⁷. They tend to limit the State scope to all States parties bound by legal rules associated with obligations *erga omnes*, though such rules are generally assumed to be universally applicable. Accordingly, all State parties to the legal rule which creates obligations *erga omnes* have a legal interest in their performance. Customarily, this will mean almost all States, except for persistent objectors, while for a treaty will simply be the parties to the treaty.

This concept identifies several characteristic features of obligations *erga omnes*. The first is such 'a generality of standing'¹²⁸ that all States parties are universally bound by a rule of an *erga omnes* character under related customary international laws or treaties. This is one of the essential features of obligations *erga omnes*. Moreover, the second is 'solidarity'¹²⁹ that every State party 'can be held to have a legal interest to protect and promote common interests' of 'international community as a whole'¹³⁰. This is linked with the enforcement of law by States which may take action and make claims in the event of violations by any other State party of international obligations towards 'international community as a whole'¹³¹.

There is a puzzle about the legal nature of the 'international community as a whole' to which *erga omnes* obligations are owed. As the ICJ observed, such obligations towards the 'international community as a whole' are under the concern and protection of all States that 'can be held to have a legal interest' in nature.¹³² This appears to illustrate the absence of such legal persons as the international community from the International Court of Justice, but not the case in States. More

¹²⁷ Ibid.

¹²⁸ Byers, in *NJIL*/1997/230

¹²⁹ Ragazzi/1997/17

¹³⁰ ICJ Reports/1970/32/[33]

¹³¹ Ibid./[34]

¹³² Ibid.

important, as ‘a personified international community’,¹³³ all State parties owe obligations *erga omnes* at the same time under an international customary law or treaty. If a State violates an obligation *erga omnes*, then all of other parties are legally injured and have equal rights to invoke legal consequences of international responsibility of this responsible State.

Accordingly, all parties to the same human rights obligation have the right to invoke the responsibility of a State who injured its own nationals to violate human rights obligations concerned. They may demand cessation of the wrong, seek guarantees against its repetition, or take action to secure these outcomes by way of counter-measures.

In addition, obligations *erga omnes* derive from ‘rules of general international law belonging to *jus cogens* and codified by international treaties’¹³⁴ with numerous State parties to protect universal or quasi-universal rights related under international law. This seems to indicate that such obligations are likely to have some relations with *jus cogens* rule and all kinds of criminal law rules in international law, whereas they are distinguished from other rules. The above characteristic features identified are just primary requirements of such obligations and their basic respects to differentiate between international criminal law rules and *jus cogens* norms.

In the field of human rights, obligations *erga omnes* are those of all State parties who have a legal interest in their performance of the customary law or treaty obligations, to prosecute any other State party as authors of international wrongful acts, directly in breach of basic rights of humane beings ‘towards the international community as a whole’¹³⁵. These acts mainly include crimes against humanity, genocide, apartheid, racial discrimination, taking of civilian hostages, slavery or slave trade, trans-territorial abduction and selling of people, torture, attacks against internationally protected persons, and hijacking aircraft. Due to lack of the injured State and imbalance between both parties of legal relationships within the rules of an *erga omnes* nature, lawful obligations between the responsible State and other State parties remain to be fully fulfilled. Obligations

¹³³ Hoogh/1996/94

¹³⁴ Ragazzi/1997/215

¹³⁵ ICJ Reports/1970/32/[34]

erga omnes appears to have bridged this gap and allow all State parties to have a legal right to protection from human rights violations by any State party against the international community on the whole. Hence, such obligations tend to contribute to an important element in the regime of implementation of human rights standards having an *erga omnes* character and promotion of basic human rights related.

Specifically, the content of obligations *erga omnes* comprises two aspects in the human rights areas. Firstly, without substance of obligations *erga omnes*, there is no specific mechanism attached to the substantive duties, regardless of customary law or treaty obligations. Secondly, the substantive content of *erga omnes* rules appears to arise State responsibility vis-à-vis injured States in the case of violations and entail them to claim against any other State party to legal rules and in breach of such material rules.¹³⁶ Under the international customary law, all States have a legal interest in the performance of the customary law obligations of others. For instance, they could make representations seeking cessation of violations with respect to the State's own nationals. Meanwhile, all State parties to a treaty could use such treaty mechanisms as the treaty provides. Under the Charter, for example, all member States may apply any human rights mechanisms regulated in this Charter, including the presenting of a resolution to the HRC.

1.1.3.2.2 Obligations of national courts in enforcement

In enforcement of international human rights standards, the State parties have the obligation to guarantee the competent bodies to supply effective remedies for human rights protection. ICCPR Article 2(3)(c) requires the State to 'ensure that the competent authorities shall enforce such remedies when granted'. These various national remedies are more speedy, effective and economic than any international ones in principle. Since national courts may directly or indirectly apply international human rights laws to concrete cases, they tend to play an essential role in practising judicial remedies on human rights protection.

However, the judicial independence appears to be a fundamental factor to decide whether judicial bodies, especially national courts, may effectively undertake the obligation to enforce international human rights laws. Without a fair

¹³⁶ Byers, in *NJIL*/1997/232

and reliable judicial system, national courts tend to have difficulties in properly bringing into play their function in the national enforcement of international human rights law.

1.1.3.2.3 Assessment of enforcement

The obligations *erga omnes* tend to have a universal effect among State parties and the third State has the right to object to any relevant violations of other States on behalf of the international community, while lacking specific mechanisms to appropriately ensure them.

Meanwhile, State parties should effectively fulfil the obligation to guarantee national courts' proper enforcement of international human rights laws concerned, whereas not all of them have a competent judicial system to ensure good enforcement situation. This is possible to weaken good effects of both obligations in enforcement. Hence, enforcement of them appears very limited, which tends to present the importance of co-operation by States bound by international human rights obligations.

There will be little consideration of the enforcement of human rights obligations in this project, in any event a relatively rare incident in international relations but one which is inconceivable against China. Compliance with international human rights standards to a great extent depends upon the co-operation of States, with States willing to find out what is required of them and then being willing to take steps to improve matters where they have been found wanting. It is not possible to speculate effectively whether or not, and if so, when China might be willing to accept onerous obligations on human rights.

1.2 China's Cooperation

As a member State of the UN, China is bound by the provisions of the Charter and any SC decisions applicable to it. It has participated in a number of UN proceedings on human rights and ratified over twenty international human rights treaties, except for the ICCPR signed in 1998.¹³⁷ Regardless of whether China's practice does fit into these human rights standards, China gradually accepts the

¹³⁷ 'RIHRTC'

concept of human rights and take measures to fulfil its due international human rights obligations. It also submits reports, drafts new instruments, engages in numerous multilateral, regional or bilateral dialogues on human rights, and frequently hosts important regional or international human rights meetings in international human rights activities.¹³⁸ Following the establishment of the HRCoun, China obtained its membership by year in 2009 term election.¹³⁹ All these activities which China has done in an effort to support the UN tend to promote and protect human rights and fundamental freedoms.

1.2.1 General

From the gradual disappearance of ideological labels in the 1990s, China began to take a positive attitude towards human rights matters, and increasingly attaches more importance to this cause. Since 1991 the Government of China has published WPs on human rights to formally confirm the status of the human rights concept in the political development of China and establish China's new views and position on human rights. Moreover, 'human rights' were enshrined in the theme report of both the Fifteenth National Congress of the Chinese Communist Party in 1997 and that of the Sixteenth in 2002 as a political concept that requires governments or the CCP to respect and protect it. This was also introduced in the 2004 Constitution as a legal concept for the first time and thus has been generally accepted as 'an important milestone' in China's human rights causes¹⁴⁰. It is vital for China to carry out this principle and put it into practice because the human rights principle remains 'lifeless paper promises rather than the reality'¹⁴¹ without proper implementation.

Since the 1990s, China has been making efforts to improve its judicial system, build judicial democracy 'and guarantee the legitimate rights and interests of citizens and legal persons through judicial justice'.¹⁴² In legislation, China formulated or amended its laws and regulations to safeguard different groups' human rights. This mainly involve its Amendments to the Constitution of the PRC

¹³⁸ 'CPHR2003'; 'CPHR2004'

¹³⁹ OHCHR 5

¹⁴⁰ 'CPHR2004'

¹⁴¹ UCLA-PLS 1

¹⁴² 'BPDC'/[X.]

adopted in 1982,¹⁴³ the Criminal Law of the PRC adopted in 1997 and its 5 Amendments, Criminal Procedure Law of the PRC adopted in 1996, and the laws concerning the judiciary, prosecutors, police and legal profession. Moreover, the Law of the PRC on Lawyers adopted in 1996 and Regulations on Legal Aid established ‘the basic framework’ respectively for the systems of lawyers and legal assistance.¹⁴⁴ The Regulations of People’s Procuratorates to Ensure the Lawful Practice of Lawyers in Criminal Procedures and Provisional Regulations on Lawyers’ Visits to Criminals in Custody improved the system of lawyers, as the Decision on Providing Judicial Aid to Litigants with Real Financial Difficulties, and Urgent Notice on Clearing Up Cases Concerning Delayed Payment for Construction Projects and Wages of Migrant Workers, did that of legal aid. The Decision on Improving the System of People’s Jurors stipulated both rights and obligations of jurors in direct participation and supervision of judicial proceedings. Accordingly, these appear to contribute to the ‘systems of trial by levels, challenge, open trial, people’s jurors, people’s supervisors, lawyers and legal assistance’ to promote judicial justice and human rights protection.¹⁴⁵

In practice, China has taken a series of measures to improve law enforcement and administration of justice in order to guarantee citizens’ human rights by the law. Apart from abiding by the above principles and systems, China observes the Regulations on Reform through Reeducation in Prisons, Regulations on the Procedures for Applications by Prisons for Commutation and Parole, and Regulations on Visits to and Correspondence of Foreign Prisoners, to safeguard the legal rights of prisoners in custody,¹⁴⁶ and the Notice on the Strict Enforcement of the Criminal Procedure Law and on the Conscientious Prevention and Correction of Extended Detention to prevent the suspects from being subjected to extended detention¹⁴⁷. From 2003, the Supreme People’s Procuratorate implemented ‘a special clear-up of complaints by prisoners at procuratorates at all levels’ to strengthen State compensation, and the Ministry of Justice practiced ‘open prison management in an all-round way’ and promote ‘the institution of law-based prison

¹⁴³ The present Constitution is the 1982 Constitution, four amendments to which were adopted by the NPC respectively in 1988, 1993, 1999 and 2004.

¹⁴⁴ ‘BPDC’/[X.]

¹⁴⁵ *Ibid.*

¹⁴⁶ ‘CPHR2003’/[III]

¹⁴⁷ *Ibid.*

work'.¹⁴⁸ In 2004, the SPP also formulated the Opinions on Interrogating Suspects When Handling and Investigating Cases Involving Arrest to protect suspects' legal rights during investigation and arrest; the MOPS and SPP organized to build 'model units for strengthening the enforcement of surveillance and legal supervision, and for guaranteeing smooth criminal proceedings and the legal rights and interests of detainees' in all detention centers of China.¹⁴⁹ The implementation of the 2005 Law on Punishments in respect to Management of Public Security from 1st March 2006 tends to prevent policeman from extorting confessions by torture or collecting evidence by unlawful means. This appears to protect human rights of the suspects from infringement.

1.2.2 Conflicts

It is generally accepted that China has drawn a distinction between international standard-setting and implementation, which it sees as a matter of domestic jurisdiction. Also, it has been careful with those treaties to which it has become a party, not to take on any burdensome implementation of obligations. This has generated frequent condemnation by members of the international community and NGOs who have resorted to putting pressure on it to increase or improve its compliance with the international human rights laws, which it accedes to or is a party to. China routinely objects when foreign States seek to demand human rights compliance from China.

External bodies generally regard China as 'one of the worst human rights violators in the world today'¹⁵⁰ and frequently claim serious and widespread human rights breaches perpetrated across China.¹⁵¹ They always argue that China has usually drawn a distinction between international standard-setting and implementation. Specifically, this mainly concerns unlawful detention, torture or ill-treatment, lack of fair trials in many sentences and decisions, the number of death sentences and executions, misuse of the global anti-terrorism war, and restricted freedom of expression and religion.¹⁵² It was also repeatedly criticised

¹⁴⁸ Ibid.

¹⁴⁹ PD 4

¹⁵⁰ UCLA-PLS 2

¹⁵¹ AI 2-4; 'CRHRP-2004'; 'CRHRP-2003'

¹⁵² Ibid.

that the Chinese Government has an offensive attitude towards international investigation of alleged human rights violations.¹⁵³

As a response, from 1991, the Information Office of the State Council of the People's Republic of China issued official WPs, on general human rights undertakings or particular issues relating to the human rights situation in China. This aims to defend its persistent policy and position on human rights issues and to object to the criticism of the foreign States who seek to demand its human rights observance, especially using human rights matters to interfere with its internal affairs¹⁵⁴.

General WPs mainly focus on five topics, namely, people's rights to subsistence and development, civil and political rights, judicial guarantee for human rights, economic, social and cultural rights, and international human rights exchanges and cooperation. This appears to reflect primary aspects of human rights issues that the Government pays more attention to. However, 'all-round progress in China's human rights undertakings'¹⁵⁵ is the only perspective to expressly expound upon its human rights situation in all of general WPs. This seems not to constitute convincing arguments against condemnation on all controversial matters involved, or deny human rights violations in some concerns, but disregard its poor situation, especially on civil and political rights, to a certain degree. Such a poor situation appears to be just part of the reasons for acute censure on 'China's long march towards rule of law',¹⁵⁶ and even its 'whitewash',¹⁵⁷ of some human rights abuses in practice.

Accordingly, the Chinese Government recently issued the Position Paper of China at the 59th Session of the UN General Assembly and Position Paper of the People's Republic of China on the United Nations Reforms. This reaffirms China's principles and position on human rights issues and refutes some of the corresponding criticisms as an addition to above WPs, mainly concerning below aspects. Firstly, it is every State's 'obligation to promote and protect human rights in accordance with the purposes and principles' of the Charter 'and international

¹⁵³ 'CRHRP-2004'; 'CRHRP-2003'

¹⁵⁴ *PD* 1

¹⁵⁵ 'CPHR2004'/(Foreword)

¹⁵⁶ Peerenboom/2002

¹⁵⁷ *AI* 5

human rights instruments in light of the country's actual conditions.'¹⁵⁸ This tends to indicate international human rights obligations that China should undertake. The second is on 'a balanced development of both types of human rights'.¹⁵⁹ China maintains that both types of rights, namely, civil and political rights, and economic, social and cultural rights should be given equal importance for both of them in balance. It follows that China has a proper attitude towards this balanced development and governmental WPs are not a so-called 'whitewash',¹⁶⁰ to explain away its poor situation in civil and political rights through emphasis on progress of other rights.

Furthermore, both the PP-China2004 and PP-China2005 support 'the UN in reforming the human rights mechanism'.¹⁶¹ The essence of this reform is 'depoliticizing human rights issues, rejecting double standards, reducing and avoiding confrontation and promoting cooperation' to improve 'human rights technical cooperation projects and countries' human rights capacity building'.¹⁶²

Clearly, China strongly opposes such phenomena as 'double standards' and the politicizing of human rights matters in the international community. It is an undeniable fact that some States 'often use human rights as an excuse for strong-arm politics and to interfere in China's domestic affairs'.¹⁶³ For instance, in 2004, the USA censured China's 'backsliding' human rights situation during an election year when Bush had severe domestic pressure to solve the trade deficit with China, but not in 2002 or 2003 when the USA needed China's support in various matters. Several European countries followed the US in opposing China for their own interests once before UN, despite the fact that European countries 'generally have favoured constructive dialogues with China',¹⁶⁴ diverse from the US's consistent oscillation position. Accordingly, the above conditional critical resolutions are likely to contain subjective and biased assessments of China's human rights matters under the 'double standard'.¹⁶⁵ This appears not to contribute to substantive

¹⁵⁸ 'PP-China2004'

¹⁵⁹ 'PP-China2004'

¹⁶⁰ AI 5.

¹⁶¹ 'PP-China2004'; 'PP-China2005'

¹⁶² 'PP-China2005'

¹⁶³ UCLA-PLS 2

¹⁶⁴ Ibid

¹⁶⁵ Ibid.

progress on any international affairs, but to damage friendly human rights cooperation.

The mistake of such phenomena, however, cannot justify the validity of the Chinese human rights records. It is the fact that no State can perfectly meet the requirements of the human rights ideal and its realisation is a progressive process. This requires 'international cooperation on human rights' on the basis of 'equality and mutual respect' to reduce and avoid confrontation, even if various human rights views derive from 'the political, economic and cultural differences of each country', as China consistently calls for.¹⁶⁶ Mutual censure and confrontation on human rights issues appear to ignore the above differences, lack mutual understanding of and respect for this variance, and go against beneficial international cooperation in the field of human rights.

1.2.3 Recent Developments

Meanwhile, things seem to be improving slightly and gradually with the development of international human rights dialogues and cooperation. Quite apart from action within the UN, States may agree with other States about human rights standards and implementation. It is common for the US and EU to make human rights questions part of the dialogue they each have with States with which they trade. This enables human rights matters to be raised at a political level, without specific reference to any binding source for the human rights obligations. China has provisions similar to this in its agreements with the US and EU. Between 21st November and 2nd December of 2005, China consented to a visit by the UN Special Rapporteur on Torture, followed by another visit of an officer of the OHCHR in this summer. The Special Rapporteur has published his report, which was considered by the HRC in March 2006. With the replacement of the HRCoun with the HRC, China presented its candidature to the HRCoun and was elected as a member by year in 2009.

1.2.3.1 China's statements

¹⁶⁶ 'PP-China2005'

In applying for the membership of the HRCoun, the Chinese Government made an important statement on China's human rights policy and position.¹⁶⁷ State representatives of China shared the same opinions contained in the 1st session of the HRCoun.¹⁶⁸

The Chinese Government 'is committed to the promotion and protection of human rights and fundamental freedoms of the Chinese people',¹⁶⁹ as 'a long-term endeavour'.¹⁷⁰ In recent 28 years, it has promoted 'social progress in all fields' and 'adopted nearly 300 laws and regulations' regarding the protection of civil and political rights.¹⁷¹ Meanwhile, much work remains to be done.¹⁷² Following the human rights principle enshrined in the 2004 Constitution, the building of 'a harmonious society featuring social justice and overall human development'¹⁷³ became an essential part of 'the overall national development strategy'.¹⁷⁴ For instance, 'building a new socialist countryside' was put forward as a goal in the 11th Five-Year Plan for National Economic and Social Development in 2006 to effectively protect human rights.¹⁷⁵

China 'respects the universality of human rights' and cooperates with the UN to protect and promote human rights.¹⁷⁶ It 'has acceded to 22 international human rights instruments'¹⁷⁷; 'earnestly fulfilled its obligations'¹⁷⁸; is creating conditions for the ratification of the ICCPR 'at an early date'¹⁷⁹; actively cooperates with the OHCHR¹⁸⁰; the HRCoun and GA¹⁸¹; responsibly responds to 'the communications from all the special procedures of the HRC as well as those transmitted through 1503 Procedure'¹⁸².

¹⁶⁷ HRCoun 1

¹⁶⁸ HRCoun 1-8

¹⁶⁹ HRCoun 1/1/[II]

¹⁷⁰ HRCoun 2

¹⁷¹ HRCoun 1/1/[II]

¹⁷² Ibid./[III]

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid./1-2

¹⁷⁶ Ibid./2/[IV]

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid./2/[V]; HRCoun 3

¹⁸¹ Ibid./3-4/[VII]

¹⁸² Ibid./3/[V]

Considering differences among countries on human rights issues, China advocated ‘constructive dialogue and cooperation’¹⁸³ ‘based on equality and mutual respect’, and ‘effective institutional safeguard’¹⁸⁴. It is ‘extensively engaged in such dialogues within regional, sub-regional and inter-regional cooperation frameworks’ through hosting workshops, seminars and participating in world conferences.¹⁸⁵ It also holds that the HRCoun should ‘continue to focus its attention on widespread and gross violations of human rights’;¹⁸⁶ equally emphasize civil and political rights and economic, social and cultural rights; ‘ensure impartiality, objectivity and non-selectivity in the consideration of human rights issues’; and remove ‘double standards and politicization’.¹⁸⁷

1.2.3.2 The EU-China dialogue

As one of main topics that the EU and China relations follow,¹⁸⁸ the human rights dialogue between them was initiated in 1996 to constitute a platform for the EU to engage in China’s sensitive issues ‘directly to the Chinese authorities in an open and constructive atmosphere.’¹⁸⁹ After a short break due to a critical resolution tabled by 10 EU member States at the 1997 session of the HRC, the dialogue was resumed and ‘has been held twice a year’ since 1997,¹⁹⁰ with joint efforts of China and the EU.¹⁹¹ In support of the dialogue ‘in a rather open and constructive atmosphere’ at expert level,¹⁹² moreover, the EU-China Dialogue Seminars on Human Rights have been established since February 1998. These notably seek to promote human rights progress and the rule of law in China. The seminars in 2004 and 2005 focus on the core provisions of the ICCPR, which seeks to assist China in the ratification and implementation of the ICCPR.¹⁹³ Both sides have reached both a consensus in a series of aspects and retained disagreements on some concerns in human rights areas.

¹⁸³ HRCoun 9/3

¹⁸⁴ Ibid.

¹⁸⁵ HRCoun 1/3/[VI]

¹⁸⁶ HRCoun 9/2

¹⁸⁷ HRCoun 1/4/[VII]

¹⁸⁸ Europa 1

¹⁸⁹ Europa 2

¹⁹⁰ Ibid.

¹⁹¹ China 1

¹⁹² DIHR

¹⁹³ FCO; EUCHRN 1

The delegations of the EU and China share opinions on many basic points listed below. The first is the position on the human rights dialogue of both sides. The EU's position on China's human rights issues is in favour of 'dialogue and against confrontation',¹⁹⁴ to 'tackle their differences in a frank, open and respectful manner',¹⁹⁵ and promote exchange and cooperation on human rights matters.¹⁹⁶ China shares the same position to persistently call for the international community to handle such differences arising from the diversity in economic, social and cultural situations in various countries.

Secondly, both the EU and China make joint efforts to actively construct 'an open and friendly environment',¹⁹⁷ for the human rights dialogue to reinforce human rights progress in China. Following the resumption of the EU-China dialogue on human rights in November 1997,¹⁹⁸ foreign ministers of the EU reached an agreement to give up their confrontation policy towards China and no longer to put forward a critical resolution on China's human rights records before the UN in 1998.¹⁹⁹ Such a change appears to benefit further development and progress in this dialogue, which has been highly appreciated by China. Meanwhile, China tends to contribute to a 'serious and results-oriented dialogue' and has 'given a series of encouraging signals' regarding human rights matters.²⁰⁰ The EU and China are satisfied with the openness and friendliness of this human rights dialogue as a constructive means for EU-China communication on a large range of relevant issues.

Thirdly, through a variety of 'active, frequent and constructive approaches',²⁰¹ the EU and China have maintained a friendly partnership and engaged in promoting progress of China's human rights causes. They systematically put forward human rights matters at diverse levels within the framework of political dialogues 'from working level meetings to annual summits' involving the heads of States.²⁰² Moreover, a range of seminars²⁰³ tend to contribute to 'in-depth

¹⁹⁴ FMPRC 1

¹⁹⁵ Europa 4

¹⁹⁶ FMPRC 2

¹⁹⁷ Qianlong 2

¹⁹⁸ Europa 4

¹⁹⁹ China 1

²⁰⁰ Europa 4

²⁰¹ DELCHN 1

²⁰² Ibid.

²⁰³ EUCHRN 1-5

discussions among officials and experts' on ICCPR ratification in an open and constructive manner.²⁰⁴ Both sides share the opinion of having the same human rights goal, regardless of varying paths of every State. It is necessary to further exchange such issues to promote ratification of the ICCPR as a long-term strategy for improving China's human rights progress.²⁰⁵

Fourthly, both the EU and China have fully recognised the significance and fruitful achievements²⁰⁶ of the EU-China human rights dialogue. This dialogue is generally recognised as a preferred and acceptable channel for the EU to improve China's human rights situation in various areas of its concerns,²⁰⁷ which depends on whether human rights 'progress is achieved on the ground'.²⁰⁸

Furthermore, the EU and China welcomed achievements from the human rights dialogue²⁰⁹ and positive developments have been achieved in the implementation of three primary policy papers at different stages. Firstly, considerable developments in the European Union, China, and EU-China relations since 1998 indicate 'the scope and need for further enhancement' and broadening of human rights 'dialogue and co-operation and fine-tuning existing instruments'.²¹⁰ Secondly, in implementing action points identified in the EU Strategy towards China: Implementation of the 1998 Communication and Future Steps for a More Effective EU Policy, 'the establishment of 'the rule of law' and the development of the legal system' have been improved.²¹¹ The human rights dialogue tends to contribute to China's enhancement of cooperation with the UN human rights mechanisms, exchange of views and information on 'individual cases of human rights violations', and more EU human rights-related assistance projects on sensitive issues.²¹² It is good progress in domestic practice that China submitted 'the draft for a first civil code' to the National People's Congress, strengthened judges training, improved 'the rule of law' in economic areas, experimented elections at township level' and the role of grassroots organizations in policy

²⁰⁴ Europa 5/10-11

²⁰⁵ FCO

²⁰⁶ FMPRC 2

²⁰⁷ Ibid.

²⁰⁸ Europa 6/13

²⁰⁹ Qianlong 1

²¹⁰ Europa 5/5-6

²¹¹ Europa 6/8

²¹² Ibid./13

making.²¹³ Thirdly, till April 2005, most action points on human rights dialogue in A Maturing Partnership-Shared Interests and Challenges in EU-China Relations were properly implemented, partly or totally.²¹⁴ Additionally, some co-operation programmes have been successfully initiated to promote ‘tangible improvements’ on China’s human rights situation.²¹⁵

However, there are various debates and discrepancies between the EU and China. These differences are obvious and debates are heated, especially during EU-China dialogue seminars on human rights. For instance, a series of debates mainly revolve around the right to defence, judicial guarantees, fair trial, arbitrary arrest and detention, serious crimes punishable by the death penalty, and torture.²¹⁶ On the basis of these controversial issues, the EU delegation actively put forwards relevant recommendations to assist the reform of legal reforms for China’s ratification of the ICCPR. Differently, the Chinese side concluded that the principles that Chinese legal systems follow are generally consistent with the ICCPR, though some legal reforms are essential. It is not a simply legal issue, but more sophisticated approaches are needed to, completely remove the discrepancies in some areas and prepare for the ratification of the ICCPR.

Similarly, the EU has the comprehensive and detailed reviews on the EU-China human rights dialogue, whereas the Chinese official opinions usually described great achievements and ongoing reforms in general language or on the basis of textbooks without specifically mentioning unachieved points. For example, in assessing the human rights dialogue, a senior official appreciated its good progress on human rights issues and China founded a special work force to research on ICCPR ratification to implement its concrete points.²¹⁷ During sessions of the dialogue, both introduced their own new developments in human rights areas and China made a detailed introduction and clarification in answer to questions presented by the EU, followed by agreements on related joint projects and field visits.²¹⁸ Leaders of both sides agreed to continue engaging in it in a more meaningful and fruitful way, reaffirmed respect for international human rights

²¹³ Europa 6/12

²¹⁴ Europa 7/5-6

²¹⁵ DELCHN 1

²¹⁶ FOC, EUCHRN 1-5

²¹⁷ Sohu

²¹⁸ Qianlong 2

standards and cooperation with UN human rights mechanisms, and affirmed their desire to reinforce human rights assistance.²¹⁹

This appears to constitute the basic parts of the Chinese official reports on the EU-China human rights dialogue. Within such limited materials, it is difficult to find any information on the shortcomings of this dialogue or details of unrealised action points in its implementation. This seems to present China's views that this dialogue is basically successful in general and some unachieved action plans are negligible. Its positive attitude is similar to that of the EU, while the EU gave equal importance to both fruitful achievements and unsolved concerns, different from China. Accordingly, the primary problems between the EU and China are mainly manifested in the reporting of unachieved action plans, which include several aspects as follows.

Firstly, China never provides 'a clear timetable' for ratification of the ICCPR or 'statistics on the use of the death penalty' as an answer to the EU.²²⁰ There is 'no substantial progress' on 'the use of the death penalty, administrative detention and torture', to which China is willing 'to be more responsive' to them.²²¹

Secondly, considerable differences between the EU and China also continue over other fundamental freedoms and rights. They mainly include 'disregard for fundamental freedoms, arbitrary detention and re-education through labour, torture, the crackdown on pro-democracy activists, the situation of minorities and capital punishment'.²²²

Thirdly, in implementing the 2003 Communication, some action points fail to be properly practised in part or entirely. Specifically, the level of the human rights dialogue has not yet been upgraded to vice-ministerial level, the regular dialogues made marginal progress to improve remaining concerns and 'continued in the usual format' without involving more partners.²²³

Hence, with the above actual difficulties and problems, a noticeable gap still exists 'between generally accepted international standards and the human rights

²¹⁹ Qianlong 1

²²⁰ Europa 6/13

²²¹ Ibid.

²²² Qianlong 1

²²³ Europa 7/6

situation on the ground,²²⁴ especially regarding civil and political rights enshrined in the ICCPR.

1.2.3.3 The US-China dialogue

Since 1990, the US has censured China before the HRC 11 times on political grounds, which led to bad relations and even a short break in rights dialogues, between both states. Nonetheless, both China and the US share 'extensive' 'common interests' and 'common major responsibility',²²⁵ in confronting a new chance of cooperation rather than competition,²²⁶ as 'two significant powers in the world'.²²⁷ A healthy development of 'bilateral relations is not only in the fundamental interests of the two peoples, but also conducive to the world as a whole'. The two sides 'do agree' 'to discuss the common points and differences in 'a cordial manner' to 'increase consensus, properly handle disputes, minimize controversies and avoid confrontation by taking a strategic and long-term vision'. In general, they have 'kept a good relationship over the past three decades despite some twists and turns' and 'should respect each other and keep consultations on an equal footing' to 'continue developing the important bilateral ties'.²²⁸

With Sino-US relations developing in depth, 'dialogue in various areas is becoming more systematic and organized'.²²⁹ This appears increasingly related to more profound matters in the US' China strategy and multi-level contacts with the government, Congress, federal or State level and bureaucrats, and the public.²³⁰ During the fifth meeting in 2005, both the presidents of China and the US spoke highly of the improvement of bilateral relations and reiterated their desires for joint efforts to make more progress on such productive and helpful relations.²³¹ In addition to a proposal recommended by the president of China for a 'further promotion of China-US constructive and cooperative ties', including exploration of

²²⁴ Europa 5/10; Europa 6

²²⁵ Xinhuanet 15.

²²⁶ Xinhuanet 4.; Xinhuanet5.

²²⁷ Xinhuanet 1.; Xinhuanet 13.; Xinhuanet12.

²²⁸ Xinhuanet 6

²²⁹ *China Daily*

²³⁰ Ibid.

²³¹ Xinhuanet 15

‘ways to establish a mechanism for dialogue and consultation’, both leaders had good talks about a series of concerns.²³²

China’s president Hu Jintao stated that China would consistently continue to build ‘democratic politics with Chinese characteristics’ and to improve ‘human rights standards enjoyed by the Chinese people on the basis of conditions of China and people’s willingness’²³³. Chinese Premier Wen Jiabao reaffirmed that China sticks resolutely to ‘a peaceful development path’, which appears conducive to the fundamental interests of both the Chinese people and the rest of the world. With the aim to ‘build a prosperous, strong, democratic and culturally advanced country’²³⁴, China’s stability and development tends to contribute a lot to human rights progress and world economic prosperity. As a response, the president of the US appreciated China’s growing social, political and religious freedom and encouraged China to ‘continue making the historic transition to a greater freedom’.²³⁵ This appears to indicate that the two countries have different human rights situations on the basis of ‘different historical and cultural backgrounds and conditions’.²³⁶

Hence, with ‘Two-way street’ communication²³⁷, Bush’s frequent visits to China tend to achieve ‘important results’²³⁸ and send a ‘positive signal’²³⁹ to the US’ relations with China, ‘an important country’.²⁴⁰ This will be of great significance to advance both sides to ‘jointly address various global challenges despite their vast differences’²⁴¹ and contribute to regional and global peace, stability, and development.²⁴²

1.2.3.4 Visits to China

During her visit to China in 2005, Louise Arbour, an officer from the OHCHR, expressed her ‘guardedly optimistic’ attitude towards China’s progress on human

²³² Xinhuanet 10; *China Daily*; Xinhuanet 11

²³³ Xinhuanet 8

²³⁴ Xinhuanet 12

²³⁵ Xinhuanet 7

²³⁶ Ibid.

²³⁷ Xinhuanet 2

²³⁸ Xinhuanet 16

²³⁹ Xinhuanet 14

²⁴⁰ Xinhuanet 15

²⁴¹ Xinhuanet 3

²⁴² Xinhuanet 9; Xinhuanet 17

rights and ‘enormous potential for positive change’.²⁴³ Meanwhile, numerous concerns and challenges are mentioned, mainly involving ‘the extensive use of the death penalty’, ‘the lack of reliable data on the extent’ of its use, and its improper legal procedures and the RETL system.²⁴⁴ Due to China’s signing of the ICCPR and ratification of the ICESCR, the OHCHR signed a Memorandum of Understanding with the Government of China to help China ‘remove obstacles to ratification’ of the ICCPR and ‘to implement recommendations’ of the ICESCR during that visit.²⁴⁵ The agreement indicated the common desire of further cooperation between both sides to improve China’s human rights situation.

This appears to be an important step for China to be closer to the ratification of the ICCPR by the NPC Standing Committee. Considering the important role China plays in global human rights issues and the great concern the international community has over China’s human rights situation, it is desirable to examine its potential ratification of the ICCPR in near future. This tends to clarify common misconceptions about China’s human rights situation from the international society and promote understanding and cooperation between China and external bodies on such issues.

Subsequently, the UN Special Rapporteur on Torture finally realised his two-week visit to China in November 2005, ‘[N]early a decade after the initial request’ in 1995.²⁴⁶ He visited three places, namely, Beijing, Lhasa in Tibet Autonomous Region and Urumqi in XUAR, with the aim to ‘fact-finding and starting a process of cooperation’ to eradicate torture in China.²⁴⁷ ‘All meetings with detainees were carried out in private and in locations designated by the Rapporteur with the Ministry’s help to ensure ‘that the mission proceeded as smoothly as possible’.²⁴⁸ He also met ‘with a number of individuals outside of his official programme’, notwithstanding obstructions by ‘some Government authorities’.²⁴⁹ Despite the limitations on above conditions and ‘the size and complexity of China as well as

²⁴³ UN Press Release

²⁴⁴ Ibid.

²⁴⁵ UN Press Release

²⁴⁶ OHCHR 1

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

the limited duration of the mission', his written report will be submitted to the HRC at the 62 Session in 2006.²⁵⁰

1.3 Summary

Recent developments of human rights mentioned above show that China, while not necessarily embracing the international human rights project, is not as hostile to it as it once was. It is an important step for China to cooperate with the UN on human rights matters. If China does cooperate further, then ratification of the ICCPR would be the next significant move. Nonetheless, the broad distinction between standard-setting and implementation and even enforcement remains in place. In the face of such an attitude, the role of proper implementation becomes more imperative than ever.

It is generally realised that governments with systematic human rights violations cannot escape from examination and condemnation by the UN organs merely by invoking the domestic jurisdiction in Article 2(7) of the Charter or avoiding ratification of international human rights treaties. Although they are not legally obliged to cooperate with the UN organs or fact-finding bodies, some stubborn ones are likely to change their position. This may result from 'an improvement of the human rights situation or the hope that a more cooperative attitude might lead to a termination of the examination and to assistance in the framework of the advisory services programme'.²⁵¹ Thus, it is wise for a State to take cooperative actions with the UN.

Since critical observers and external bodies have distinct roles and perspectives from the Chinese Government's, they speak with different voices and in different language. Generally, a governmental source is official and reports of a foreign government, e.g., the Human Rights Country Reports by US State Department, are likely to have a certain political tendency. It often reports human rights abuses in various countries, rather than those in Iraq. Information from a NGO, e.g., AI or HRW appears to be neutral, even if the source depends on media reports. With some shortcomings of the UN systems, the UN organs are always influenced by political factors in examining human rights situations. The absence

²⁵⁰ Ibid.

²⁵¹ Nowak, in *NYIL*/1991/88

of attacks or resolutions against a State does not mean that there have not been any, or have been very minor, human rights infringements in its territory. By contrast, frequent criticism appears not to amount to its systematic human rights violations.

Nonetheless, information from the USSD, AI, HRW and UN seems to cover comprehensive contents, which is meaningful source. It is desirable for both sides to strengthen the international communication and dialogue on human rights in order to reduce or avoid unnecessary disputes. Considering the poor situation of China's human rights and the characteristic of progressive realisation of civil and political rights, it is also essential to have more cooperation and dialogues to keep its human rights process on track and make greater achievements.

In accordance with the official media in China, China's international human rights dialogues appear so superficial and political that they are just presentations of political desires rather than substantial and constructive dialogues on certain human rights problems. It is worthy to be noted that China tends to report the above events from a positive perspective, different from the international community. For example, the UN wholly expatiated upon Louise's visit, mentioning China's remaining concerns, its important role in global human rights causes, and the signing of the MOU. By comparison, the above Chinese news is characterized by its focus on successful progress and its omission of existing problems. More important, this is not the correspondents' abuses of literal skills, but the common official language. This appears to indicate China's inadequate courage to really criticise its shortcomings to the public or insufficient knowledge on how to substantively do it.

There remain problems on whether China fully understand the scope and significance of its human rights obligations and on how far China's practice does fit into, or depart from, international human rights standards. Those questions could constitute primary contents of constructive human rights dialogues between China and the international community.

Chapter II THE DEATH PENALTY AND INTERNATIONAL HUMAN RIGHTS LAW

2.1 General

After the Second World War, a number of international human rights or humanitarian norms addressed the limitation and even the abolition of the death penalty, which has given considerable momentum to the progress of its abolition. As the ‘cornerstone of contemporary human rights law’,²⁵² the UDHR, adopted on 10th December 1948, expressly provided for ‘the right to life’ in Article 3 without an explicit limitation. Similarly, Article 1 of the American Declaration on the Rights and Duties of Man²⁵³, adopted on 4th May 1948, and the African Charter of Human and People’s Rights²⁵⁴, adopted in 1981, stipulated such an unqualified provision.

In a dissimilar approach, the ICCPR, ECHR²⁵⁵, and American Convention on Human Rights²⁵⁶ mentioned the death penalty as an exception at the core of the right to life. As the first international human rights treaty, the ECHR, completed in 1950 and in force since 1953, is the only treaty to list exceptions to this right. This formulation is diverse from both the UN and Inter-American systems. For instance, the ICCPR, adopted in 1966 and in force since 1976, and the ACHR, passed in 1969 and in effect since 1978, simply prohibit life from being ‘arbitrarily’ taken, which is open to different interpretations.

The ‘right to life’ protects individuals from being killed by the State, but the right is not absolute. One exception is capital punishment, whereas the power of the State to impose capital punishment is not unlimited. The ICCPR prohibited the ‘right to life’ from being arbitrarily deprived and permitted the imposition of the death penalty for ‘the most serious crimes’ with an ever-shrinking scope. Even when applied, it also requires rigorous procedural safeguards for its use and should exclude such categories of persons as juveniles and pregnant woman. Capital punishment may not be applied on the enemy combatants under capture, except

²⁵² Schabas/2002/23

²⁵³ OAS/RES/XXX(1948)

²⁵⁴ 211/LM/1982/58

²⁵⁵ 213/UNTS/222

²⁵⁶ 1144/UNTS/123

where such application meets the requirements enshrined in the Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War²⁵⁷ and Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts²⁵⁸.

Furthermore, the implementation of the death penalty may necessarily involve the prohibition of torture, cruel, inhuman and degrading treatment or punishment. The most important related instrument is the CAT, adopted by the GA in 1984. It was initiated pursuant to the 1976 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²⁵⁹. This prohibition also exists in UDHR Article 5, ICCPR Article 7, ECHR Article 3, Charter of Fundamental Rights of the European Union²⁶⁰ Article 19, ADRDM Article XXVI, ACHR Article 5, and ACHPR Article 5.

Until 1983 when the Protocol No. 6 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms²⁶¹ was adopted to aim at abolition in peacetime, there was no international instrument that advocated the abolition of the death penalty. Subsequently, the ICCPR-OP2-DP²⁶² was adopted in 1989 and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty²⁶³ was also completed in 1990. Both of them entered into force in the next year and authorise States parties to retain the death penalty in wartime, while providing for its total abolition. However, the Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances was completed in 2002 and came into force in 2003. This appears to contribute to further promoting the progress of abolition, especially in Europe as ‘for all intents and purposes abolitionist’.²⁶⁴

Under the support of the Organisation of American States, Latin American States promoted abolition within the UN and Inter-American systems. Apart from

²⁵⁷ 75/UNTS/135

²⁵⁸ 1125/UNTS/3

²⁵⁹ UN Doc. A/RES/3452(XXX)/annex/30

²⁶⁰ OJ/2000/C364/1

²⁶¹ ETS/114

²⁶² UN Doc. A/RES/44/128

²⁶³ OAST/1990/73

²⁶⁴ Schabas/2002/365

the ACHR-P-DP, the ACHR appears to go further in imposing limitations on the death penalty. It excludes both political crimes and the elderly from its applicable scope, and prevents abolitionist countries from reintroducing it.

The African human rights systems send out 'ambiguous signals on capital punishment',²⁶⁵ whilst making progress with a series of efforts taken by the African institutions. The ACHPR, adopted by the Organization of African Unity in 1981, never mentioned the death penalty as a qualification to the scope of the right to life provision. Since 1990, nonetheless, many African States have formally abolished or discarded the death penalty. In 1995, the Constitutional Court of South Africa considered that the use of the death penalty is against the prohibition of 'cruel, inhuman or degrading treatment or punishment' in the Section 11(2) of the South African Constitutional Law.²⁶⁶ In 1999, the African Commission on Human and People's Rights adopted the Resolution Urging States to Envisage a Moratorium on the Death Penalty to 'consider establishing a moratorium on executions of death penalty',²⁶⁷.

This review of the primary international norms on the death penalty tends to show an inexorable course towards progressive abolition in development. International law has been setting higher and higher standards for both substantial and procedural requirements of the death penalty that may be imposed in any trials. Its applicable scope is increasingly being limited and essential requirements are gradually becoming stricter, which is actually partial abolition of, and goes towards complete abolition of, the death penalty. As of 1 January 2006, the ICCPR-OP2-DP²⁶⁸ has been ratified by 56 States and eight other States remain to ratify it after signatures, while the ACHR-P-DP has been 'ratified by eight States and signed by one other in the Americas'.²⁶⁹ The ECHR-PN6 has gained ratification by 45 States and signature by one other and the ECHR-PN13 respectively by 33 and 10 others among European states.²⁷⁰ As the latest facts and figures signify, 86 countries and territories have abolished it for all crimes, 11 others eliminate it except for wartime

²⁶⁵ Ibid./15

²⁶⁶ *S v. Makwanyane and Another*, SACLR/LEXIS/1995/218

²⁶⁷ 'RUSEM-DP', AHRComm/RES/42(XXVI)99

²⁶⁸ UN Doc. A/RES/44/128

²⁶⁹ AI 1

²⁷⁰ Ibid.

crimes, and 25 others are abolitionist in practice, constituting 122 abolitionist countries in law or practice.²⁷¹

Although progress has been made by treaty towards the abolition of the death penalty, most States are not prohibited from using capital punishment in any circumstances. It is necessary, therefore, to identify what conditions the treaties impose on State parties which still retain some right to use the death penalty. Furthermore, it may be the case that there are limitations to the use of the death penalty within customary international law. China is not a party to any relevant regional treaty, ICCPR or ICCPR-OP2-DP, but it has signed the ICCPR. It will be helpful to observe what obligations for China would arise if it becomes a party to the ICCPR and consider if there are obligations which have been created by China's signature of the ICCPR. In particular, if there are acts of customary international law on the death penalty, they will bind China, as would any obligations which could be found in the Charter.

This chapter seeks to explore the requirements of the death penalty under international human rights law in an attempt to examine international human rights obligations of China. Because much of the law about the death penalty is found in treaties and is supported by standards in other international documents, it is necessary to consider each treaty regime and each document separately. With respect to China, the most important treaty is the ICCPR. Hence, there are several primary issues: What obligations does the ICCPR place upon China for its signature? What treaty obligations have been imposed on China as a party to human rights treaties? What has become customary related in the evolution of human rights law?

2.2 The ICCPR

As one of the five instruments constituting 'International Bills of Rights', the ICCPR in force has been ratified by 156 States as of 8th May 2006.²⁷² China signed it as a member State of the UN pursuant to Article 48(1), but has not yet ratified it. This appears to indicate that China has to undertake only the 'obligation not to

²⁷¹ Ibid.

²⁷² OHCHR 6

defeat the object and purpose of the treaty prior to its entry into force'²⁷³ before its ratification. The 'object and purpose of the treaty' appear to be found in its Preamble and further be determined by the principle of customary rules, especially the doctrine related to *erga omnes*. Under customary international law, some provisions in the ICCPR might legally bind China as a non-persistent-objector, after the signing and before the ratification of the ICCPR. Nonetheless, the treaty shall come into force for China and impose on China treaty obligations, 'three months after the date of the deposit of its own instrument of ratification'.²⁷⁴ This will obligate China to live up to the international standards of this whole treaty, except for effective reservations.

The ICCPR involves various international obligations on civil or political rights. Among them, Articles 6, 7, 14 and 15 are directly or indirectly related to the death penalty. Article 6 is the right to life provision to expressly refrain from arbitrary deprivation of life and authorise the death penalty in a restrictive manner. Article 7 is to prohibit torture, cruel, inhuman or degrading treatment or punishment, which appears to limit the use of the death penalty in several respects. Article 14 sets down the right to equality before the courts, to a fair and public hearing, and the minimum guarantees, of the accused in criminal trials. This equally applies to accused persons facing the death penalty. Article 15 requires the prohibition of retroactive criminal law, which means that all criminal laws involving the death penalty should not be retroactive. Thus, it is desirable to interpret these provisions in detail to examine potential obligations that China has to accept concerning the death penalty after ratifying the ICCPR.

2.2.1 The Right to Life

The right to life involves a comprehensive coverage. Diverse definitions of human life are likely to affect 'the extent of the State's duty to ensure' this right.²⁷⁵ Considering the ordinary meanings of the common threats to every human being, the right should be restrictively interpreted as a civil right in ICCPR Article 6.

²⁷³ VCLT Article 18

²⁷⁴ ICCPR Article 49(2)

²⁷⁵ Nowak/1993/123/[34]

Article 6(1) specifies the right to life as a right ‘inherent’ in every human being and requires its legal protection and the prohibition against its ‘arbitrary’ deprivation. There are three sentences to deal with the right to life, of which the first recognised the significance of this right. Its ‘inherent’ nature appears to suggest that it is such ‘the supreme right’,²⁷⁶ that first and foremost necessitates effective guarantee. It also has the non-derogable character without derogation to be potentially permitted even under any emergency circumstances under Article 4(2).²⁷⁷ This confirmed its priority among various human rights. The expression that ‘[E]very human being has the inherent right to life’ may indicate that the right to life is customary in nature,²⁷⁸ and that the protection of human life is the object of this whole article.

The second, stating that ‘[T]his right shall be protected by law’, explicitly stipulated the obligation of the State to protect the right to life by law. The wording of ‘protected by law’ expressed the positive nature of this obligation²⁷⁹ and the legality principle of protection of the right. This appears to require that all cases where life may be taken by the State must be provided for by legislative provisions.²⁸⁰ The obligation appears to bind only on the national legislature of the State and leave it a broad discretion to take positive measures to ensure the right in fulfilment of duties. Yet the extent of such legislation appears to rest with how to understand the scope of the right that the State requires to effectively protect. These measures tend to include all necessary steps to ensure rights protection, inferred from the general obligation in Article 2(1) and (2).

Considering the nature of the right to life, ‘protected by law’ must be a law of homicide which covers killings by State officials and by private persons. Accordingly, States must take measures to enforce the homicide law--investigate deaths, bring prosecutions, and punish persons convicted. States also must protect persons against unlawful killing. Where a State wishes to give its officials special powers to kill, e.g., security forces in suppressing insurrections against the State, it

²⁷⁶ GC/6(6)/[1]

²⁷⁷ Ibid.

²⁷⁸ Dinstein, in Henkin/1981/115; Lillich, in Meron/1984/121

²⁷⁹ GC/6(6)/[5]

²⁸⁰ Dinstein, in Henkin/1981/115

must do so by law. Where a State wishes to use the death penalty, it must equally do so by law.

The third sentence stipulated that '[N]o one shall be arbitrarily deprived of this right', which protects the right to life by prohibiting its arbitrary deprivation. The wording 'arbitrarily' tends to have a scope broader than 'against the law', including 'elements of inappropriateness, injustice and lack of predictability'.²⁸¹ It is likely to appear as something legal but arbitrary because tyrannical laws seem to have conflicts with international human rights or humanitarian standards.²⁸² Thus, the arbitrary deprivation of the right to life mainly involves killings 'against the law', against 'natural justice or the due process of law',²⁸³ or against legal but arbitrary rules.

Meanwhile, the meaning of 'arbitrarily' is vague and remains to be interpreted.²⁸⁴ The HRCCom has stated that 'arbitrariness' should include notions of inappropriateness, injustice and lack of predictability.²⁸⁵ The 'automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life'.²⁸⁶ Similarly, the deprivation of life 'without due regard to the rules of natural justice or the due process of law', in a manner against the law, or pursuant to 'a law which is despotic, tyrannical or in conflict with international human rights standards or humanitarian law' appears to be 'arbitrary'.²⁸⁷ As ICCPR Articles 6(2) and 6(3) clarify, the imposition of the death penalty is not permitted to go against the provisions of the ICCPR or Convention on the Prevention and Punishment of the Crime of Genocide. Both treaties are popular international human rights law, of which justice elements contained in their provisions cannot be violated by State parties or non-parties.

The term 'arbitrary' appears not to be synonymous with, but broader than, illegal. This was confirmed by the *Suarez de Guerrero* case²⁸⁸ and a killing that is

²⁸¹ Hugo van Alphen v. The Netherlands(CCPR/C/39/D/305/1988)[5.8]

²⁸² Nsereko, in Ramcharan/1985/248

²⁸³ Schabas/2002/99

²⁸⁴ Nowak/1993/110

²⁸⁵ Hugo van Alphen v. The Netherlands(CCPR/C/39/D/305/1988)[5.8]

²⁸⁶ Rayos v. Philippines(CCPR/C/81/D/1167/2003)[7.2]; Carpo *et al.* v. Philippines(CCPR/C/77/D/1077/2002)[8.3]; Hussain *et al.* v. Guyana(CCPR/C/85/D/862/1999)[5.4]; Rolando v. Philippines(CCPR/C/82/D/1110/2002)[4.4]; Kennedy v. Trinidad & Tobago(CCPR/C/74/D/845/1998)[7.3]

²⁸⁷ Nsereko, in Ramcharan/1985/248

²⁸⁸ Suarez de Guerrero v. Colombia(CN45/1979)

authorised by domestic laws may contravene this clause. Hence, ‘arbitrarily’ may be defined as ‘illegally’ or ‘unjustly’.

Accordingly, the sentence appears to deduce that the right to life needs the protection against illegal or unjust deprivation of life by State organs and that the State has the duty to prevent and punish such interference. This protection is relative, which simply requires the State to take adequate measures to protect the right to life.²⁸⁹

2.2.2 Capital Punishment

The ICCPR recognises the death penalty as an exception to the judicial protection of the right to life in Article 6(2) to 6(6). With a series of restrictions on its use, this penalty must be applied as ‘a quite exceptional measure’.²⁹⁰ This requires substantive and procedural guarantees to limit its application and all desirable measures to suspend or abolish it.

2.2.2.1 Limitations on legislation

2.2.2.1.1 *Non-retroactivity*

Under Article 6(2), the phrase ‘in accordance with the law in force at the time of the commission of the crime’ is a specific expression of the principle *nullum crimen, nulla poena sine lege* or non-retroactivity. The term ‘law’ appears to be ‘understood in the strict sense of a general-abstract parliamentary act or an equivalent unwritten norm of common law, which must be accessible to all persons subject to the law’.²⁹¹ The clause means that the death penalty should be imposed in accordance with laws providing for the death penalty and in force at that time when the crime was committed.

This was also confirmed and specified by Article 15, which prohibited retroactive criminal laws and specified the application of a lighter penalty, applicable to the death penalty without exceptions. Specifically, the first sentence of Article 15(1) stipulated that nobody shall be held ‘guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence,

²⁸⁹ *Dermitt Barbato v. Uruguay*(CN84/1981)[10(a),11]; *Herrera Rubio v. Colombia*(CN161/1983)[11,12]

²⁹⁰ GC/6(6)/[7]

²⁹¹ Nowak/1993/209/[26]

under national or international law, at the time when it was committed'. This tends to prohibit the use of retroactive criminal laws in criminal trials and of a penalty that was not provided for under national or international law when offences were committed.

The second sentence prohibits the imposition of a heavier penalty than that applicable 'when the criminal offence was committed'. Similarly, the third further emphasised the imposition of the lighter penalty subsequently provided for by law and applicable in hearing. Offenders 'shall benefit from' the legal provisions 'for the imposition of a lighter penalty' after committing the offence. Closely related to that of 'criminal offence' composed of 'act or omission', the 'penalty' appears to be any sanction of a 'preventive' and 'restrictive' character.²⁹² Accordingly, Article 15(1) prohibits the applications of a penalty lacking a legal basis and the heavier one than that applicable, at the time of commission of criminal offences.

Moreover, Article 15(2) regulates a limitation to the above prohibition. This explicitly requires a State not to 'prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal' under national or international law. Article 15 also contains the principle of *nullum crimen, nulla poena sine lege* and appears to indicate that the death penalty should not be retroactive.²⁹³

2.2.2.1.2 Non-reintroduction

The principle of non-reintroduction is implicit in Article 6(2) and (6). Article 6(2) contains the clause-'[I]n countries which have not abolished the death penalty'. This seems to indicate the application of Article 6(2) only to 'countries which have not abolished the death penalty' rather than abolitionist States, without mentioning the non-reintroduction issue. Yet the exclusion of abolitionist States appears to imply that those which have abolished the death penalty shall not use or reintroduce it, which is consistent with the principle.

Moreover, Article 6(6) stipulates that nothing in Article 6 'shall be invoked to delay or to prevent the abolition of capital punishment' by any State party to the ICCPR. This applies to any State party to the ICCPR without limitations,

²⁹² Ibid./278[21]

²⁹³ Sapienza, in Ramcharan/1985/286

regardless of abolitionist or retentionist States. This appears to strengthen the implication in Article 6(2) and expand its applicable scope. Neither abolitionist States shall reinstate the death penalty after abolition,²⁹⁴ nor do others impose this penalty for offences or on category of persons that have been excluded from its application. This is the inherent meaning and requirements of the non-reintroduction principle.

2.2.2.1.3 Conformity with the provisions of the ICCPR and CPPCG

Article 6(2) requires the law imposing the death penalty not to contradict other provisions of the ICCPR or CPPCG.²⁹⁵ The imposition of death sentences upon conclusion of such trials in which the provisions of the ICCPR or CPPCG have not been respected constitutes a violation of Article 6(2).²⁹⁶ The limitations appear to prohibit discrimination, genocide and other violations of the ICCPR, and show that the legal bases on which to impose the death penalty should be both lawful and just.

Article 2(1) obligates each State party to respect and to ensure all individuals' rights without distinction, entailing the prohibition against any forms of discrimination involving the death penalty. This obligation can also be found in the CERD²⁹⁷ and Declaration on Race and Racial Prejudice²⁹⁸. Meanwhile, the massive use of the death penalty is likely to lead to genocide, which is unlawful and prohibited within the CPPCG. Thus, both the ICCPR and CPPCG prohibit genocide in the application of the death penalty.

Since the ICCPR and CPPCG derive from the UDHR, all provisions in the former two treaties are unlikely to go against the principles enshrined in the UDHR. This requires those involving the non-derogable right to life and the death penalty to conform to the requirements of the rule of law. Accordingly, this tends to leave no room for any unjust domestic laws to justify the application of the death penalty.

²⁹⁴ Ibid./289

²⁹⁵ GC/6(6)/[7]

²⁹⁶ *Kurbanov v. Tajikistan*(CCPR/C/79/D/1096/2002)[7.7]; *Levy v. Jamaica*(CCPR/C/64/D/719/1996)[7.3]; *Marshall v. Jamaica*(CCPR/C/64/D/730/1996)[6.6]; *Khomidov v. Tajikistan*(CCPR/C/81/D/1117/2002)[6.6]; *Khalilov v. Tajikistan*(CCPR/C/83/D/973/2001)[7.6]; *Saidova v. Tajikistan*(CCPR/C/81/D/964/2001)[6.9]; *Aliboev v. Tajikistan*(CCPR/C/85/D/985/2001)[6.6]; *Siragev v. Uzbekistan*(CCPR/C/85/D/907/2000)[6.4]; *Deolall v. Guyana*(CCPR/C/82/D/912/2000)[5.3]; *Uigun and Ruzmetov v. Uzbekistan*(CCPR/C/86/D/915/2000)[7.6]; *Arutyunyan v. Uzbekistan*(CCPR/C/80/D/917/2000)[6.4]; *Rayos v. Philippines*(CCPR/C/81/D/1167/2003)[7.3]; *Mulai v. Guyana*(CCPR/C/81/D/811/1998)[6.3]

²⁹⁷ 660/UNTS/195

²⁹⁸ E/CN.4/Sub.2/1982/2/Add.1[annex V](1982)

No policy of genocide or other forms of arbitrary deprivation of life shall be permitted to be practised through death sentences pursuant to such laws.

The HRCOM pointed out that ‘both the substantive and the procedural law in the application of which the death penalty was imposed were not contrary to the provisions’ of the ICCPR in *Mbenge v. Zaire*.²⁹⁹ As essential substantive limitations to the death penalty, the right of equality in Article 14 or the prohibition of discrimination in Articles 2(1) and 26 must not be violated by domestic laws providing for this penalty. It shall not constitute cruel, inhuman or degrading punishment in the sense of Article 7 or go against the minimum guarantees of a fair trial in Articles 14 and 15. Moreover, there is a series of both substantive and procedural guarantees detailed in the CPPCG. These require State parties to undertake the obligation to meet these requirements, as specified in the standards of this treaty, in dealing with capital punishment cases.

2.2.2.1.4 Most serious crimes

As another important substantive limitation, ICCPR Article 6(2) declares that the death penalty is imposed only for the ‘most serious crimes’. It authorised the use of the death penalty within this range in restrictive terms. Since the definitions on serious crimes vary from one country to another, the vague formulation has been adopted with varying interpretations. This seems to lead to the conclusion that ‘States are completely free to qualify a crime’ as ‘serious’ or ‘most serious’³⁰⁰, but it has been universally accepted to exclude petty offences from the scope of its use. Without an explicit definition in any international instruments, there are various explanations on this concept in the UN practice.

The HRCOM expressed the reading of the ‘most serious crimes’ so restrictively as to consider the death penalty as ‘a quite exceptional measure’.³⁰¹ The ECOSOC confirmed that the scope of this term ‘should not go beyond intentional crimes, with lethal or other extremely grave consequences’ in the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death

²⁹⁹ CN16/1977[17]

³⁰⁰ Sapienza, in Ramcharan/1985/286

³⁰¹ GC/6(6)/[7]

Penalty.³⁰² Any intentional crimes which infringe life appear to be ‘most serious crimes’ and apply the death penalty.³⁰³ The ‘other extremely grave consequences’ appear to indicate that other circumstances, e.g., circulation of ‘secret information to an enemy in wartime’, may lead to large-scale loss of life.³⁰⁴ Moreover, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions considers that ‘the death penalty should be eliminated for crimes such as economic crimes and drug-related offences’³⁰⁵, apart from ‘other so-called victimless offences, or activities of a religious or political nature’, or ‘actions primarily related to prevailing moral values’.³⁰⁶

However, many States often have diverse understandings and apply the death penalty to other offences. Among the periodic reports of States, the extent of this penalty expands to non-violent crimes, e.g., political, property and drug-related crimes, without causing death consequences.³⁰⁷ In China, the non-violent crimes which carry the death penalty contain crimes of endangering national security³⁰⁸, endangering public security³⁰⁹, undermining the order of socialist market economy³¹⁰, encroaching on property³¹¹, disrupting the order of social administration³¹², endangering the interests of national defense³¹³, graft and bribery, violation of duty by military personnel³¹⁴.

³⁰² ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, UN Doc.E/Res/1984/50(25/05/1984)

³⁰³ ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee’, CCPR/C/79/Add.1(Algeria25/09/92)[5]

³⁰⁴ Rodley/1999/219

³⁰⁵ ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’, UN Doc.E/CN.4/1998/68[94]

³⁰⁶ ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’, UN Doc.E/CN.4/1999/39[63]

³⁰⁷ Schabas/2002/105-109

³⁰⁸ They are treason, crime of splitting the country, crime of defecting to the enemy and turning traitor, crime of stealing, secretly gathering, purchasing, or illegally providing State secrets or intelligence for an organization, institution, or person outside the country, the crime of supporting enemy.

³⁰⁹ They are crime of illegally manufacturing, trading, transporting, mailing, or stocking up guns, ammunition, or explosive articles, crime of illegally manufacturing, trading, transporting, or stocking dangerous articles, crime of stealing, seizing guns, ammunition, explosive articles and dangerous articles.

³¹⁰ They are crime of producing or selling fake medicines, crime of producing or selling foods mixed with poisonous or harmful non-food materials, crime of smuggling arms, ammunitions, crime of smuggling nuclear materials, crime of smuggling counterfeit currency, crime of smuggling cultural relics, crime of smuggling precious metals, crime of smuggling precious and rare species of animals and the products thereof, crime of smuggling ordinary goods and articles, crime of counterfeiting money, crime of fraud by raising funds, financial bills fraud, monetary documents fraud, credit fraud, crime of falsely issuing exclusive value-added tax invoices, crime of defrauding export tax refunds or offsetting taxes invoices, crime of forging or selling forged exclusive value-added tax invoices.

³¹¹ It is theft only.

³¹² They are crime of teaching crime-committing methods, crime of robbing ancient cultural ruins and ancient tomb burial objects, crime of robbing ancient human fossils and ancient vertebrate fossils, crimes of smuggling, trafficking, transporting and manufacturing drugs, crime of organising prostitution.

2.2.2.2 Limitations on imposition

2.2.2.2.1 *Competent, independent and impartial tribunal*

Under Article 6(2), the death penalty may be imposed ‘pursuant to a final judgment rendered by a competent court’. Without specific procedural guarantees, Article 6(2) expressly refers to Articles 2, 14, 15 and 26, and implicitly involves Article 7, of the ICCPR. Article 14(1) went further to indicate that ‘a competent, independent and impartial’ trial by law on the basis of equality ‘before the courts and tribunals’ is the requirement of a fair trial. This obligates State parties to establish a competent, independent and impartial court as an institutional safeguard for a fair trial in all capital cases. Article 14(2)-(7) requires them to offer all accused persons the minimum rights guarantee. GC6(6) also stressed that ‘procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review by a higher tribunal.’

These procedural guarantees appear to contribute to a fair trial and apply universally to all trials. While it might be an obvious point that any criminal sentence may be imposed only after a fair trial, the requirement of a fair trial is of special importance where a defendant faces the possibility of a capital sentence. This tends to result from the seriousness of what is at stake-the death penalty, and the imposition of capital sentences potentially by special courts.

The formulation of Article 6(2), entailing the obligation of conformity with the ICCPR, suggests that violations of any of its provisions with ‘a direct impact on the imposition of the death penalty’ constitute a breach of Article 6.³¹⁵ If the final sentence of death failed to meet all requirements enshrined in this treaty, then this breaches or violates such rights as protected by Article 6.³¹⁶ The relationship

³¹³ They are crime of sabotaging weapons and equipment, military facilities or military communications, crime of intently supplying unqualified weapons and equipment and other military facilities.

³¹⁴ They are crime of defying of orders in wartime, crime of concealing military information, providing false military information, crime of refusing to relay military orders, or relaying false military order, crime of surrender, crime of fleeing from battle, crime of military personnel’s fleeing the country, crime of stealing, spying, or buying military secrets for overseas institutions, organisations, or personnel, crime of fabricating rumours in wartime, crime of stealing or snatching weaponry or war material, crime of illegality.

³¹⁵ Nowak/1993/120[28]

³¹⁶ Wright v. Jamaica(CCPR/C/45/D/349/1989)[8.3,8.7,9,10]

between Articles 6 and 14 made Article 14 non-derogable in capital cases in accordance with Article 4(2).³¹⁷

2.2.2.2.2 Equality before the courts

The right to ‘be equal before the courts and tribunals’ contained in Article 14(1) specifies the general principle of equality in Article 26. Its implementation appears to be practised mainly pursuant to Articles 2(1), 15 and other provisions in Article 14.

Courts and ‘tribunals’ are synonymous in the ordinary sense. Considering the systematic character of a whole treaty and the potential forms of violations in practice, both terms might be interpreted in a different way on the basis of normal literal meanings. The word ‘courts’ appear to assess the qualification of a judicial authority as an institutional structure in domestic legal systems, while ‘tribunals’ tend to emphasise the procedural requirements for the rights of the accused. Such guarantees are likely to avoid unqualified authorities with a tribunal guarantee or formal courts only without tribunals. Hence, the equality before the courts and tribunals is to protect the right of all persons to be equal before both qualified authorities and tribunal guarantees.

2.2.2.2.3 Right to a fair and public hearing

The right to a fair and public hearing pursuant to Article 14(1) is the core of ‘due process of law’.³¹⁸ All provisions in Article 14(2) to (7) and Article 15 specified this right of the accused in criminal cases, applicable to those facing the death penalty. Aside from institutional guarantees, Article 14(1) requires establishing ‘a competent, independent and impartial tribunal...by law’ to determine the criminal charges in ‘a fair and public hearing’ and to pronounce them publicly.³¹⁹ Accordingly, State parties should take positive measures to ensure these guarantees from five primary aspects.

³¹⁷ Reid v. Jamaica (CCPR/C/39/D/250/1987)[12.2]

³¹⁸ Nowak/1993/241

³¹⁹ Khomidov v. Tajikistan(CCPR/C/81/D/1117/2002)[6.5]

Firstly, the wording of ‘criminal charge’ is both extensive and contentious. Regardless of the nature, severity and form of this charge, capital punishment is likely to fall into the scope of its criminal punishments.

Secondly, a major institutional guarantee of Article 14 is the hearing by a competent, independent and impartial tribunal established by law.³²⁰ The term ‘tribunal’ refers to that established in national courts, with competent, established by law, independent and impartial features. This appears to denote ‘a substantively determined institution that may deviate from the formally (and nationally) defined’ term ‘court’.³²¹ The former two conditions tend to ensure tribunals to be lawfully established and their jurisdiction be determined by law. ‘Independence’ refers to the institutional arrangements which ensure that the courts shall be free from great influence. ‘Impartiality’ refers to the position of the individual judges with respect to any particular party. These appear to overlap in criminal cases.

Thirdly, the principle of a fair trial in Article 14(1) is the core of procedural guarantees. Its concrete rights on individual guarantees are contained in other provisions of Articles 14 and 15, of which Article 14(3) only stipulates the ‘minimum guarantees’ of accused persons. The important criterion of this principle is the equality of arms and of procedural rights between both parties. But the sum of such guarantees is narrower than the right to a fair trial. Thus, a criminal trial has to not only fulfil all the requirements of Article 14(2)-(7) and Article 15, but also conform to the precept of fairness in Article 14(1).

Fourthly, publicity contains both the public proceedings of judicial organs and public pronouncement of the judgement. Article 14(1) safeguards the parties’ right to a fair and public hearing before a tribunal in all criminal trials in the second sentence.³²² The principle of publicity requires ‘the public attending’ within the hearing stage, as the HRCCom assessed in *van Meurs v. The Netherlands*³²³ and *Karttunen v. Finland*³²⁴. It also necessitates both an oral pronouncement and a

³²⁰ *Mulai v. Guyana*(CCPR/C/81/D/811/1998)[6.1][6.2]; *Collins v. Jamaica*(CCPR/C/47/D/356/1989)[8.4]

³²¹ *Nowak*/1993/244-245

³²² *Kurbánov v. Tajikistan*(CCPR/C/79/D/1096/2002)[7.4]; *Deolall v. Guyana*(CCPR/C/82/D/912/2000)[5.2]

³²³ CCPR/C/39/D/215/1986[6.1-6.2]

³²⁴ CCPR/C/46/D/387/1989[6.4]

written publication of judgements. But this excludes such exceptions as morals, national security and interest of the private lives of the parties from Article 14(1).

2.2.2.2.4 Minimum guarantees of the accused in criminal trials

2.2.2.2.4.1 Presumption of Innocence

Article 14(2) provides the right to be presumed innocent for everyone who is ‘charged with a criminal offence’ ‘until proved guilty according to law’. Accordingly, the judge or the jury has the duty not to convict an accused unless there are reasonable grounds of his or her guilt.³²⁵ This duty also applies to all public authorities to ‘refrain from prejudging the outcome of a trial’, as the HRCCom stressed.³²⁶

2.2.2.2.4.2 Right to Be Informed of the Charge

Article 14(3)(a) contains the right of an accused to ‘be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him’. This involves several obligations of the State.

The duty to inform relates to the nature and cause of the charge against the accused, which requires that information must be sufficient to prepare him or her for a defence pursuant to Article 14(3)(b).³²⁷ With the inclusion of ‘in detail’, the duty under Article 14(3)(a) appears to apply to both arrested persons and those at liberty. This is more precise and comprehensive than the duty towards the arrested under Article 9(2).

The duty also requires that a person be informed promptly and the information must be provided to the accused ‘in a language which he understands’. The ‘delay in presenting the charges to the detained’ constitutes a violation of this obligation.³²⁸ In criminal hearings, the authority has the duty to supply translation services, and the accused may apply for the free service of an interpreter under Article 14(3)(f).

³²⁵ Khalilov v. Tajikistan(CCPR/C/83/D/973/2001)[7.4]

³²⁶ GC/13(14)/[7]

³²⁷ Khomidov v. Tajikistan(CCPR/C/81/D/1117/2002)[6.4]

³²⁸ Kurbanov v. Tajikistan(CCPR/C/79/D/1096/2002)[7.3]

2.2.2.2.4.3 Preparation of the Defence

Article 14(3)(b) involves the right of accused persons to ‘have adequate time and facilities for the preparation of his defence’. What adequate time generally rests with the circumstances and complexity of a particular case, basically more than a few days.³²⁹ The word ‘facilities’ appears not to permit claims to be supplied with the copies of all documents concerned, but to grant the accused or his defence counsel to have access to the documents necessary for this preparation.³³⁰

It also contains the accused’s right ‘to communicate with counsel of his own choosing’. This appears to be solely directed to the preparation of the defence, especially when the accused is held in pre-trial detention.³³¹ Typical violations happened on incommunicado detention or on a defence attorney appointed ex-officio by military courts.³³²

2.2.2.2.4.4 Claim to Be Tried without Undue Delay

Article 14 (3) (c) stipulates that any person charged with a criminal offence has the right ‘[T]o be tried without undue delay’, implicit in Article 9(2) and (3). This claim relates to pronouncing definitive judgements³³³ and overlaps with the guarantee in Article 9(3) on the pre-trial detention.

According to the HRCOM, the right to be tried without undue delay is applicable to capital cases.³³⁴ The HRCOM laid down due time limits and permitted the reasonable delay for different stages. The time limit in Article 14(3)(c) begins with the date of the accused being informed of his or her accusation and ends with that of definitive decisions being made. A reasonable time without undue delay appears to be influenced by both the circumstances and complexity of particular cases.

³²⁹ GC/13(14)/[9]; Rayos v. Philippines(CCPR/C/81/D/1167/2003)[7.3]; Little v. Jamaica(CCPR/C/43/D/283/1988)[8.3-8.4]

³³⁰ O.F. v. Norway(CN158/1983)[5.5]

³³¹ Dovud and Nazriev v. Tajikistan(CCPR/C/86/D/1044/2002)[8.5]; Aliev v. Ukraine(CCPR/C/78/D/781/1997)[7.3]; Boimurodov v. Tajikistan(CCPR/C/85/D/1042/2001)[7.3]; Siragev v. Uzbekistan(CCPR/C/85/D/907/2000)[6.3]; Chan v. Guyana(CCPR/C/85/D/913/2000)[6.2-6.4]

³³² Delia Saldias de Lopez v. Uruguay(CN52/1979,CN56/1979); Mario Alberto Teti Izquierdo v. Uruguay(CN73/1980)

³³³ GC/13(14)/[10]

³³⁴ Kelly v. Jamaica(CN253/1987)[5.12]; E.B. v. Jamaica(CN303/1988)[5.3]; R.M. v. Jamaica(CN315/1987)[6.3]

Aiming at the initial delay in appearance before a judge, the HRCCom has held that it should not exceed a few days in capital cases.³³⁵ The HRCCom considered that the delays of twelve months,³³⁶ fourteen months³³⁷ and eighteen months on pre-trial delays *per se* have not been deemed undue or unreasonable.³³⁸ The length of time before arrest and trial, or between trial and appeal, must normally be weighted against other factors, including the complexity of the case, when other factors exist.³³⁹ There are some violations with a several-year delay that could not be properly justified, e.g., in *Pinkney v. Canada*³⁴⁰, *Pratt, Morgan and Kelly v. Jamaica*³⁴¹, *Sendic Case*³⁴² and *Cariboni*³⁴³.

2.2.2.2.4.5 Right to Defence

Article 14(3)(d) specifies the right to defence as the five categories of individual rights. They are the right to be tried in one's presence; to defend oneself in person; to choose one's own counsel; to be informed of the right to counsel; and to receive free legal assistance. Such 'legal representation must be available at all stages of criminal proceedings, particularly in cases involving capital punishment'.³⁴⁴

Under the principle of a systematic interpretation, the right to defence tends to be understood as follows. Everyone charged with a criminal offence has the basic right to be present at the trial for defence. Most accused persons have two options to defend oneself in person and to choose one's own counsel as long as he or she can afford to do so. Those facing financial obstacles may be informed of the right to counsel and receive free legal assistance, if necessary in the interest of justice

³³⁵ *McLawrence v. Jamaica*(CCPR/C/60/D/702/1996)[5.6]; *Shaw v. Jamaica*(CCPR/C/62/D/704/1996)[7.3]

³³⁶ *Everton Morrison v. Jamaica*(CCPR/C/63/D/635/1995)[11.6]

³³⁷ *Samuel Thomas v. Jamaica*(CCPR/C/65/D/614/1995)[9.5]; *Leehong v. Jamaica*(CCPR/C/66/D/613/1995)[6.6]

³³⁸ *Everton Morrison v. Jamaica*(CCPR/C/63/D/635/1995)[21.3]

³³⁹ *Shaw v. Jamaica*(CCPR/C/62/D/704/1996)[7.4]

³⁴⁰ *Larry James Pinkney v. Canada*(CN27/1978)[10, 22, 25]

³⁴¹ *Earl Pratt and Ivan Morgan v. Jamaica*(CCPR/C/35/D/273/1988)(CCPR/C/35/D/210/1986)[13.4, 13.5, 14]; *Kelly v. Jamaica* (CN253/1987)[5.12, 6]

³⁴² *Violeta Setelich v. Uruguay*(CN63/1979)

³⁴³ *Raul Cariboni v. Uruguay*(CN159/1983)

³⁴⁴ *Smartt v. Republic of Guyana*(CCPR/C/81/D/867/1999)[6.3]; *Kurbanova v. Tajikistan*(CCPR/C/79/D/1096/2002)[6.5]; *Aliev v. Ukraine*(CCPR/C/78/D/781/1997)[7.3]; *Robinson v. Jamaica*(CN223/1987)[10.3]; *Brown v. Jamaica*(CCPR/C/65/D/775/1997)[6.6]; *Angel Estrella v. Uruguay*(CN74/1980)[8.6, 10]; *Reid v. Jamaica*(CCPR/C/39/D/250/1987)[13]; *Grant v. Jamaica*(CCPR/C/50/D/353/1988)[8.6]; *Pinto v. Trinidad and Tobago*(CCPR/C/39/D/232/1987); *Kelly v. Jamaica*(CCPR/C/41/D/253/1987)[5.10]; *Aliboev v. Tajikistan*(CCPR/C/85/D/985/2001)[6.4]; *Chan v. Guyana*(CCPR/C/85/D/913/2000)[6.2, 6.3, 6.4]; *Uigun and Ruzmetov v. Uzbekistan*(CCPR/C/86/D/915/2000)[7.4]; *Arutyunyan v. Uzbekistan*(CCPR/C/80/D/917/2000)[6.3]

administration. This necessity depends mainly on the seriousness of the offence and the maximum of potential punishments.

2.2.2.2.4.6 Calling and Examining Witnesses

Under Article 14(3)(e), the right to ‘obtain the attendance and examination of witnesses’ ‘under the same conditions’ as the prosecutor is an essential element of a fair trial. The right of the accused to ‘obtain the attendance and examination of witnesses on his behalf’ is relative and restricted ‘under the same conditions as witnesses against him’. Such cases as *Sendic v. Uruguay*, *Mbenge v. Zaire*, obviously violate this minimum guarantee of a fair trial.³⁴⁵

On the contrary, the right to examine, or have examined, the witnesses for the prosecution has no restriction. This fully considers the distinction between the examinations in different trials. Yet both rights appear to guarantee that the parties are treated equally on the interrogation of witnesses and the introduction of evidence.

2.2.2.2.4.7 Claim to the Free Assistance of an Interpreter

Article 14(3)(f) requires the right of the accused to ‘have the free assistance of an interpreter if he cannot understand or speak the language used in court’. From the wording of this clause, it appears that all oral materials should be, and all written documents might be, translated in hearing.

Since Article 14(3)(a) requires the accused to be informed of ‘the nature and cause of the charge against’ him or her in a language that he or she understands, the written documents on ‘the nature and cause’ should be translated. This does not determine whether it is essential to translate these documents on other information or not. Pursuant to VCLT Articles 31 and 32, the meaning of Article 14(3)(f) may be interpreted in the light of its object and purpose. The purpose of appointing an interpreter is to guarantee that an accused that ‘cannot understand or speak the language used in court’ equally enjoys a fair trial. Hence, the written documents in entire hearings should be translated as the language applied in court.

³⁴⁵ Khomidov v. Tajikistan(CCPR/C/81/D/1117/2002)[6.5]; Uigun and Ruzmetov v. Uzbekistan(CCPR/C/86/D/915/2000)[7.5]

Meanwhile, the free assistance of an interpreter is absolute without an exception. This is applicable to anyone who conforms to the above condition in Article 14(3)(f), including aliens and members of linguistic minorities.

2.2.2.2.4.8 Prohibition of Self-incrimination

Article 14(3)(g) prohibits self-incrimination, relating to the accused in all cases. This prevents every accused person from being ‘compelled to testify against himself or to confess guilt’ to a crime³⁴⁶.

The term ‘to be compelled’ means ‘various methods of extortion or duress and the imposition of judicial sanctions’ in order to force an accused to testify his guilt.³⁴⁷ The prohibition ‘must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt.’³⁴⁸ The HRCCom called upon the State parties to prohibit the use of unlawful evidence by forced confessions or statements,³⁴⁹ e.g., the violations of Article 14(3)(g) by Uruguay.³⁵⁰

2.2.2.2.4.9 Juvenile Trials

Article 14(4) obligates the State parties to ‘take account of their age and the desirability of promoting their rehabilitation’ in hearing the case of juvenile persons in criminal trials. This fails to expressly entail for them the obligation to establish juvenile courts. But juvenile trials different from those against adults are normally accomplished by juvenile courts, which is just the special courts and procedures noted by the HRCCom.³⁵¹ The establishment of juvenile courts and relevant procedures needs more attention paid to the interests of promoting the rehabilitation of juveniles. As Article 40(1) of the CRC referred, the objective is to

³⁴⁶ Dovud and Nazriev v. Tajikistan(CCPR/C/86/D/1044/2002)[8.3]; Kurbanov v. Tajikistan(CCPR/C/79/D/1096/2002)[7.5]; Khomidov v. Tajikistan(CCPR/C/81/D/1117/2002)[6.5]; Saidov v. Tajikistan(CCPR/C/81/D/964/2001)[6.3]; Boimurodov v. Tajikistan(CCPR/C/85/D/1042/2001)[7.2]; Khalilov v. Tajikistan(CCPR/C/83/D/973/2001)[7.3]; Aliboev v. Tajikistan(CCPR/C/85/D/985/2001)[6.3]; Deolall v. Guyana(CCPR/C/82/D/912/2000)[5.1]; Uigun and Ruzmetov v. Uzbekistan(CCPR/C/86/D/915/2000)[7.3]; Berry v. Jamaica(CCPR/C/50/D/330/1988)[11.7]; Nallaratnam Singarasa v. Sri Lanka(CCPR/C/81/D/1033/2001)[7.4]

³⁴⁷ Nowak/1993/264[59]

³⁴⁸ Berry v. Jamaica(CCPR/C/50/D/330/1988)[11.7]

³⁴⁹ GC/13(14)/[14]

³⁵⁰ Delia Saldias de Lopez v. Uruguay(CN52/1979)[13]; Miguel Angel Estrella v. Uruguay(CN74/1980)[10]; Hiber Conteris v. Uruguay(CN139/1983)[10]; Raul Cariboni v. Uruguay(CN159/1983)[10]

³⁵¹ GC/13(14)/[16]

promote ‘the child’s reintegration and the child’s assuming constructive role in society’.

2.2.2.2.4.10 Right to an Appeal

Article 14 (5) safeguards that everyone ‘convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law’. This general formulation recognises the principle of a right to appeal, without a specification of its types. The State party is under the obligation to protect this right from being violated.³⁵²

Specifically, the review proceeding takes place before ‘a higher tribunal’ and the minimum guarantees of a fair and public trial shall be observed in all proceedings. The right to an appeal is universally applicable to all convicted persons whose crimes are variously described with different terms. Meanwhile, the phrase of ‘according to law’ appears to be unambiguous.³⁵³

2.2.2.2.4.11 Right to Compensation for the Miscarriage of Justice

ICCPR Article 14(6) stated that those who have ‘suffered punishment as a result of such conviction’ as ‘a miscarriage of justice’ ‘shall be compensated according to law’. It recognises the right to compensation in the case of a sentence based on a miscarriage of justice.

Article 14(6) appears to obligate the State parties to a detailed obligation on compensation. Specifically, the claim to compensation involves such prerequisites as conviction by a final judgement for a criminal offence and later reversal of the condition or pardoning of convicted persons. The ground on which to reverse such conviction or pardon the convicted is that ‘a new or newly discovered fact shows conclusively’ ‘a miscarriage of justice’, and the convicted has no fault concerning this miscarriage but ‘has suffered punishment as a result of such conviction’. The

³⁵² Chisanga v. Zambia(CCPR/C/85/D/1132/2002)[7.2]; Saidov v. Tajikistan(CCPR/C/81/D/964/2001)[6.5]; Domukovsky *et al.* v. Georgia(CCPR/C/62/D/623/1995)(CCPR/C/62/D/624/1995)(CCPR/C/62/D/625/1995)(CCPR/C/62/D/626/1995)(CCPR/C/62/D/627/1995)[19]; Khalilov v. Tajikistan(CCPR/C/83/D/973/2001)[7.5][8]; Barno Saidova v. Tajikistan(CCPR/C/81/D/964/2001)[6.5]; Aliboev v. Tajikistan(CCPR/C/85/D/985/2001)[6.5]

³⁵³ See 2.2.2.1.1

only exception is that 'the non-disclosure of the unknown fact in time is' proved 'wholly or partly attributable to' them.

It is worthy of note that the very fact of the imposition of a death sentence as a result of a miscarriage of justice might need compensation. If the death sentence is carried out after a miscarriage of justice, any forms of compensation appear to only contribute to relieving the mental sufferings of the family of persons executed to death.

2.2.2.2.4.12 The Principle of 'Ne Bis In Idem'

Article 14(7) contains the principle of '*ne bis in idem*' or the prohibition against double jeopardy. It specifies that no one 'shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'. This prohibits a person from being tried or punished again for the same offence.

The term 'finally convicted or acquitted' signified that convictions or acquittals are made after exhaustion of all ordinary methods of judicial review or appeal and expiration of all waiting periods. This requirement relates only to a conviction or acquittal in accordance with the law and penal procedure of each country. An acquittal in another State that does not correspond to the legal system of the State concerned does not lead to application of '*ne bis in idem*', consistent with the HRCCom's opinion in *A.P. v. Italy*³⁵⁴.

In many States, a new criminal trial is justified by extraordinary circumstances, even to the detriment of an acquitted or already convicted person. Similarly, the HRCCom took the stance that any justifications may not represent a violation of this principle.³⁵⁵ Such extraordinary circumstances will include the situation where the accused has been acquitted for want of evidence and new evidence was subsequently discovered which linked him with the commission of that crime. Such an acquitted convict may be retried on the basis of new evidence.

2.2.2.2.5 Prohibition of the death penalty for persons under the age of 18

³⁵⁴ 35265/97[1999]EHRCourt61

³⁵⁵ GC/13(14)/[19]

Following the above procedures in conformation with the rule of law before a competent tribunal, there is another limitation in imposing the death penalty. Article 6(5) stipulates that ‘sentence of death shall not be imposed for crimes committed by persons below eighteen years of age’. This contains a substantive limitation to the death penalty on young persons less than 18 years old.

In this context, the age at the time of committing crimes appears to be an essential factor and the ‘eighteen years of age’ is an age limit. Considering ‘crimes committed’, offenders shall not be sentenced to death for ‘crimes committed’ below the age of 18, even if being convicted at the time they are beyond the age of 18 years. On the contrary, they are eligible for the imposition of the death penalty if older than 18 at the time of committing crimes.

2.2.2.3 Limitations on execution

2.2.2.3.1 *Amnesty, pardon or commutation of the death penalty*

ICCPR Article 6(4) states that anyone ‘sentenced to death shall have the right to seek pardon or commutation of the sentence’ and ‘[A]mnesty, pardon or commutation of the sentence of death may be granted in all cases’. Pursuant to it, after a final judgement with the sentence of death came into force, the death penalty may be mitigated, instead of being executed. Amnesty also should be granted to make every effort to avoid execution of the death penalty rendered in all cases. This is one of requirements for the national legislature of the State.

There is a general meaning in the terms of amnesty, pardon or commutation in the sense of Article 6(4), despite variation in legal terms among countries. Pardon means that ‘an enforceable penalty is voided in full’, while commutation means the replacement of the death penalty with a lighter penalty.³⁵⁶ Both of these involve both the power of the State and the legal rights of the convicted facing the death penalty to seek legal remedies. By comparison, amnesty means collective pardon for various cases, which appears not to be a right. The State may grant amnesty, even if the accused never applies for it.

2.2.2.3.2 *Prohibition of execution of pregnant women*

³⁵⁶ Nowak/1993/121[30]

Article 6(5) requires the State not to carry out the death penalty on pregnant women. This explicitly prohibits the death penalty from being executed on such persons, but is unclear whether it also precludes it after the pregnancy of such persons. There are two potential interpretations on pregnant women within the ambit of Article 6(5) and the narrow one is to leave execution open to them³⁵⁷ subsequently. This is based on the assumption that excluding them from being executed appears to 'prevent killing of an innocent baby', precisely an unborn baby.³⁵⁸

The other is not to carry out the death penalty on pregnant women in any case on the basis of the wide protection of both unborn and newborn babies. This broad explanation appears to have a wide scope and be preferable, which has been accepted by humanitarian provisions. PAI Article 76(3) recognised prohibition of execution of 'mothers having dependant infants', applicable to armed conflicts. Protocol Additional to Geneva Convention relative to the Protection of Civilian Persons in Time of War Article 6(4) also precludes 'mothers of young children' from execution. Hence, pregnant women tend to include those in pregnancy period and after the pregnancy, including 'mothers having dependant infants' or 'of young children'.

2.2.2.3.3 *Extradition, expulsion, deportation and the death penalty*

There is no explicit provision about whether States parties may extradite, expel or deport individuals facing the threat of the death penalty in the ICCPR. Under Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 3(1), however, no State party 'shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. This appears to influence the policy on extraditing, expelling, and deporting persons facing the death penalty to a certain degree. In three Canadian applications, the HRCCom appears not to consider the right to life provision as a requirement to refrain from extraditing or

³⁵⁷ Dinstein, in Henkin/1981/117

³⁵⁸ Sapienza, in Ramcharan/1985/288

deporting a person facing capital punishment to a retentionist State.³⁵⁹ This is likely to lead to its indirect use in abolitionist States³⁶⁰, breaching the principle of non-reintroduction in the ICCPR.

Moreover, no person may be extradited, expelled or deported to a country with 'necessary and foreseeable' threats that will violate the ICCPR, according to the HRCOM's jurisdiction.³⁶¹ Hence, States can refuse to extradite, expel or deport a person facing the death penalty in the event of its possible imposition.

2.2.2.3.4 *Humane treatment*

Article 7 prohibits torture, cruel, inhuman or degrading treatment or punishment. Without any restrictions, the right to humane treatment appears to be absolute³⁶² and have a broad coverage. It is also a non-derogable right considering no derogation from this Article even in emergency as required in Article 4. Accordingly, this entails for the State parties a positive duty to prohibit such treatment by private persons,³⁶³ regardless of their specific intents³⁶⁴ or purposes.

Furthermore, torture, cruel, inhuman or degrading treatment or punishment tends to emphasise 'treatment', while the death penalty highlights 'punishment'. Yet the prohibition of such treatment is of considerable relevance to the practice of the death penalty. In capital cases, both physical pain³⁶⁵ and mental sufferings³⁶⁶ that inflicted on persons facing the death penalty are likely to amount to violations of the right to humane treatment. The prohibition of such treatment mainly applies to 'death row phenomenon'³⁶⁷, the execution method of the death penalty,³⁶⁸ repeated beatings³⁶⁹ and even extorted confessions as a result of treatment violating Article 7 in capital cases.³⁷⁰

³⁵⁹ A.R.J. v. Australia(CCPR/C/60/D/692/1996)[6.13]

³⁶⁰ Kindler v. Canada(CCPR/C/48/D/470/1991)[6.5]; Ng v. Canada(CCPR/C/49/D/469/1991)[13.5]; Cox v. Canada(CCPR/C/52/D/539/1993)[16.1-16.2]

³⁶¹ T. v. Australia(CCRC/C/61/D/706/1993)[5.3]; A.R.J. v. Australia(CCPR/C/60/D/692/1996)[6.8]

³⁶² Ahani v. Canada(CCPR/C/80/D/1051/2002)[10]

³⁶³ GC/20(7)/[2]

³⁶⁴ Quinteros et al. v. Uruguay(CN107/1981)[12.3,14]; Rojas Garcia v. Colombia(CCPR/C/71/D/687/1996)[2.1,10.5]

³⁶⁵ Kurbanov v. Tajikistan(CCPR/C/79/D/1096/2002)[7.4]; Boimurodov v. Tajikistan(CCPR/C/85/D/1042/2001)[7.2]

³⁶⁶ Chisanga v. Zambia(CCPR/C/85/D/1132/2002)[7.3]

³⁶⁷ Johnson v. Jamaica(CCPR/C/56/D/588/1994)[8.5]; Francis v. Jamaica(CCPR/C/54/D/606/1994)[12.4]

³⁶⁸ Ng v. Canada(CCPR/C/49/D/469/1991)[16.1-16.4]

³⁶⁹ Howell v. Jamaica(CCPR/C/79/D/798/1998)[6.2]; McTaggart v. Jamaica(CCPR/C/62/D/749/1997)[8.7]

³⁷⁰ Saidov v. Tajikistan(CCPR/C/81/D/964/2001)[6.2]; Khomidov v. Tajikistan(CCPR/C/81/D/1117/2002)[6.2];

The ‘death row phenomenon’ is the inhuman treatment that results from the special circumstances on death row, ‘and the often prolonged wait for executions or where the execution itself is carried out in a way that inflicts gratuitous suffering’.³⁷¹ Since every prisoner should be treated with humanity, the requirements of the Standard Minimum Rules for the Treatment of Prisoners should be satisfied to keep the suffering of those facing the death penalty at a minimum. The EHRCourt held this phenomenon contrary to the ECHR in *Soering*.³⁷² In a different approach, the HRCCom declared that ‘prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment, even if they can be a source of mental strain’, whereas ‘the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary.’³⁷³ This basic position and opinion is unchanged, albeit there are various capital cases relating to this point.³⁷⁴

Apart from the long delay, ‘compelling circumstances’ are another difficult point to explain concerning death row. The exact meanings are distinct from those of ‘deplorable conditions of detention’ on death row or cell.³⁷⁵ The HRCCom attempted to cite the SMRTP as a standard and concluded that such circumstances ‘beyond the mere length of time’ in imprisonment ‘under a sentence of death amounted to an additional violation of Article 7’.³⁷⁶

As the HRCCom noted, the death penalty ‘must be carried out in such a way as to cause the least possible physical and mental suffering’ in its application.³⁷⁷ This appears to require the methods of its implementation not to cause superfluous pain. Actually, every ‘known method of judicial execution in use today, including execution by lethal injection, has come under criticism for causing prolonged pain or the necessity to have the process repeated.’³⁷⁸ But comparatively, death by lethal

Khalilov v. Tajikistan(CCPR/C/83/D/973/2001)[7.2]; Berry v. Jamaica(CCPR/C/50/D/330/1988)[11.7]

³⁷¹ Schabas/2002/141; Sarah Joseph/2004/23

³⁷² Soering v. United Kingdom and Germany

³⁷³ Pratt and Morgan v. Jamaica(CN210/1986, 225/1987)[13.6]

³⁷⁴ Kindler v. Canada(CCPR/C/48/D/470/1991), Simms v. Jamaica(CCPR/C/53/D/541/1993), Rogers v. Jamaica(CCPR/C/53/D/494/1992), Hylton v. Jamaica(CCPR/C/57/D/600/1994); Barrett and Sutcliffe v. Jamaica(CN270/88,272/88)

³⁷⁵ Levy v. Jamaica(CCPR/C/64/D/719/1996)[6.5]; Morgan and Williams v. Jamaica(CCPR/C/61/D/609/1995)[6.3]; Marshall v. Jamaica(CCPR/C/64/D/730/1996)[5.7]

³⁷⁶ Wilson v. Philippines(CCPR/C/79/D/868/1999)[7.4]; Johnson v. Jamaica(CCPR/C/56/D/588/1994)[8.5]; Francis v. Jamaica(606/1994)[9.1]; Uigun and Ruzmetov v. Uzbekistan(CCPR/C/86/D/915/2000)[7.11]

³⁷⁷ GC/20(7)/[6]

³⁷⁸ Ng v. Canada(CCPR/C/49/D/469/1991)[B.]

injection appears not to be inhuman, especially considering that the same method is generally proposed by supporters of euthanasia.

Moreover, mental anguish and stress that the families of executed persons suffered may constitute inhuman treatment. The HRCCom considered that the failure to notify them ‘of the scheduled date for the execution’ and ‘of the location of...grave amounts to inhuman treatment of the author’, in breach of Article 7.³⁷⁹ Similar decisions were also made in other cases³⁸⁰.

2.3 Optional Protocols

Both the Optional Protocol to the International Convention on Civil and Political Rights and Second Optional Protocol to the International Convention on Civil and Political Rights Aiming at the Abolition of the Death Penalty pay attention to the protection of such fundamental human rights as the right to life. Relating to the ICCPR, they appear to contain human rights standards applicable to the death penalty, despite that the ICCPR-OP1-DP makes no reference to this penalty.

The ICCPR-OP1-DP authorises individual communications presented to the HRCCom for violations of any provisions in the ICCPR. Articles 1 and 2 provide for the following requirements of such communications that the HRCCom has the competence to receive and consider. The individuals who claim to be victims are subject to the jurisdiction of the State party. The content of claims is the breach by that State party of any of the rights set forth in the ICCPR.³⁸¹ These individuals ‘have exhausted all available domestic remedies’ before submitting written communications to the HRCCom for consideration.³⁸²

By Article 4, the State party has the obligation to cooperate with the HRCCom after receiving any communications and to submit to ‘written explanations or statements clarifying the matter and the remedy, if any, that may have been taken’ within six months.³⁸³ Under Article 5, the HRCCom shall consider these

³⁷⁹ Schedko v. Belarus(CCPR/C/77/D/886/1999)[10.2]

³⁸⁰ Rolando v. Philippines(CCPR/C/82/D/1110/2002)[5.4]; Dovud and Nazriev v. Tajikistan(CCPR/C/86/D/1044/2002)[8.7]; Aliboev v. Tajikistan(CCPR/C/85/D/985/2001)[6.7]; Staselovich v. Belarus(CCPR/C/77/D/887/1999)[9.2]; Pratt and Morgan v. Jamaica(CN210/1986)(CN225/1987)[13.7]; Quinteros v. Uruguay(CN107/1981)[14]; Aliboev v. Tajikistan(CCPR/C/85/D/985/2001)[6.7]; Uigun and Ruzmetov v. Uzbekistan(CCPR/C/86/D/915/2000)[7.10]; Rayos v. Philippines(CCPR/C/81/D/1167/2003)[7.1]; Lyashkevich v. Belarus(CCPR/C/77/D/887/1999)[9.2]

³⁸¹ ICCPR Article 1

³⁸² ICCPR Article 2

³⁸³ Smartt v. Republic of Guyana(CCPR/C/81/D/867/1999)[6.1]

communications, after examining that there is no same matter ‘being examined under another procedure of international investigation or settlement’, or that available domestic remedies have not been exhausted.³⁸⁴ It also considers the case where the application of the remedies is unreasonably prolonged as an exception. But it appears not ‘to evaluate the facts and evidence in a particular case, unless it could be ascertained that the evaluation of evidence and the instructions to the jury were clearly arbitrary or otherwise amounted to a denial of justice’.³⁸⁵ Since the ICCPR deal with the death penalty, the procedure in the ICCPR-OPI-DP equally applies to all cases concerning this penalty.

Different from the ICCPR, the ICCPR-OPII-DP aims at abolishing the death penalty. As Article 1(1) stipulated, no one within the jurisdiction of a State Party to the ICCPR-OPII-DP shall be executed. This seems to explicitly prohibit the execution of capital punishment without its imposition, whereas both the imposition and execution should be abolished considering Article 1(2). Article 1(2) stipulates that each State party ‘shall take all necessary measures to abolish the death penalty within its jurisdiction’. This entails for State parties the positive duty to ‘take all necessary measures’ to prohibit the imposition and execution of this penalty. Meanwhile, this clearly involves the principle of non-reintroduction as an essential means towards abolition because reintroduction would be quite incompatible with this treaty and a State with reintroduction would have to withdraw from it.

Nonetheless, there is an exception to the abolition of capital punishment, which means that the ICCPR-OPII-DP tends not to abolish it in any circumstances. As Article 2(1) specified, there is no reservation admissible, ‘except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime’.

2.4 The CAT

³⁸⁴ ICCPR Article 6

³⁸⁵ Smartt v. Republic of Guyana(CCPR/C/81/D/867/1999)[5.3]; Lyashkevich v. Belarus(CCPR/C/77/D/887/1999)[9.3]; Lloyd Reece v. Jamaica(CCPR/C/78/D/796/1998)[7.3]; Errol Simms v. Jamaica(CCPR/C/53/D/541/1993)[6.2]; Lyndon Marriott v. Jamaica(CCPR/C/55/D/519/1992)[6.3]; Catalina Marín Contreras v. Spain(CCPR/C/83/D/1099/2002)[6.3]; Henry & Douglas v. Jamaica(CCPR/C/57/D/571/1994)[6.4]

The CAT set substantive provisions³⁸⁶, enforcement procedure mechanisms³⁸⁷, the international machinery³⁸⁸ and other relevant provisions to prohibit torture, cruel, inhuman or degrading treatment or punishment. This involves the protection of persons facing the death penalty from such treatment in the implementation of this penalty. China signed the CAT on 12th December 1986 and ratified on 4th October 1988. This entails for China relevant international human rights obligations as a State party with its entry into force in China on 3rd November 1988.³⁸⁹

Article 1 defined torture as ‘any act by which severe pain or suffering, whether physical or mental...’ in nature is inflicted. Such conduct is ‘intentionally inflicted’ ‘for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...’. It is also governmental conduct that is prohibited only ‘when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. This appears to establish a general concept of torture that China should prohibit.

However, the scope of torture is limited and ‘does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.³⁹⁰ The exclusion of ‘lawful sanctions’ does prevent a State from engaging in the practice of torture authorised by domestic legal systems. This seems to leave much room for a breach of this treaty without being found to have done so. To avoid such escape, it is desirable to borrow the language³⁹¹ from the DBST. It identified the criteria of ‘inherent in or incidental to lawful sanctions’ as to the extent consistent with the SMRTP³⁹² in its Article 1. More importantly, the torture potentially involving the death penalty is only inflicted on those facing the death penalty, excluding ‘a third person’.

³⁸⁶ CAT Articles 1, 2 and 16

³⁸⁷ CAT Articles 5, 6, and 7

³⁸⁸ CAT Articles 17, 19, 20, 21 and 22

³⁸⁹ ‘Second Periodic Reports of States Parties Due in 1993: China. 15/02/96, CAT/C/20/Add.5[1]

³⁹⁰ CAT Article 1

³⁹¹ Boulesbaa/1999/39

³⁹² UN Doc. E/RES/663C(XXIV)(31/07/1957), UN Doc. E/RES/2076(LXII)(13/05/1977)

It is worthy of note that there is a clear difference between the death penalty and torture defined in Article 1. Where the death penalty is a lawful sanction, then it is not torture under the CAT. But if it is not lawful sanction and is imposed for the purpose of Article 1 in the CAT, it may be torture but more likely inhuman treatment. This is also the distinction between capital sentence and arbitrary execution. Hence, the obligation of China under Article 1 appears not to deduce its duty of the complete abolition, but the strict restrictions, of the death penalty.

Under CAT Article 2(1), China is obligated to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’. This obligation is not to totally prevent torture, but to take indispensable steps to achieve reasonable results or reasonably prevent it.³⁹³ This achievement requires the practical implementation of ‘legislative, administrative, judicial or other measures’ adopted by China. The best way to assess the effectiveness of these measures is ‘through the mechanisms of international law by which the unilateral judgments...can be challenged’,³⁹⁴ considering the object or purpose of this treaty.

China is also responsible for ‘acts of torture’ committed ‘in any territory under its jurisdiction’.³⁹⁵ The wide extent of ‘any territory’ involves its territories, ‘occupied or unoccupied territories’.³⁹⁶ Moreover, neither ‘exceptional circumstances whatsoever’ even in public emergency, nor superior orders, ‘may be invoked as a justification of torture’, in accordance with two other clauses of Article 2. This appears to indicate that the obligation to prohibit torture is non-derogable.

Furtermore, China has the obligation to prohibit ‘other acts of cruel, inhuman or degrading treatment or punishment’, ‘committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an

³⁹³ ‘Summary Record of the Second Part of the 423rd Meeting: China. 09/05/2000’, CAT/C/SR.423/Add.1[4-5](China); ‘Third Periodic Reports of States Parties Due in 1997 : China. 05/01/2000’, CAT/C/39/Add.2[5-58](China); ‘Summary Record of the 251st Meeting : China. 05/06/96’, CAT/C/SR.251[4-5](China); ‘Summary Record of the Public Part of the 254th Meeting: China, Croatia. 10/05/96’, CAT/C/SR.254[China B.](China, Croatia); ‘Summary Record of the Public Part of the 252nd Meeting: China. 08/05/96’, CAT/C/SR.252/Add.1[22](China); ‘Second Periodic Reports of States Parties Due in 1993: China. 15/02/96’, CAT/C/20/Add.5[4-63](China); ‘Conclusions and Recommendations of the Committee against Torture: Togo.28/07/2006’, CAT/C/TGO/CO/1/[12]

³⁹⁴ Boulesbaa/1999/87

³⁹⁵ CAT Article 2(1)

³⁹⁶ Boulesbaa/1999/88

official capacity' under Article 16. Such treatment prohibited is not unlimited and only that related to 'a public official or other person acting in an official capacity' may fall into the category of this prohibition. The obligation also extends to these acts which China may conduct outside its geographical frontiers.

In fact, China has taken effective steps to prevent the acts of cruel, inhuman or degrading treatment by State officials and has been making efforts to improve its legislation and enforce the relevant legal provisions against torture.³⁹⁷ In legislation, the 1982 Constitution,³⁹⁸ Law on Prisons of the PRC adopted in 1994, Law of the PRC on State Compensation adopted in 1994, People's Police Law of the PRC adopted in 1995, PL, Judges Law of the PRC adopted in 1995, 1996CPL and 1997CL are primary legal safeguards against torture as 'a criminal act'.³⁹⁹ Specifically, 1995PPL Article 33 stipulates: '[A] people's policeman has the right to refuse to carry out any directive that exceeds the mandate of the people's police as defined by laws and regulations and, at the same time, has the right to report such a breach to a higher authority.' This appears to effectively 'prevent anyone from citing a superior's order as a pretext for using torture'.⁴⁰⁰

The 1996CPL contributes to preventing torture and other cruel, inhuman or degrading treatment or punishment from being imposed on persons suspected, accused or convicted of criminal offences. It abolished the system of detention for interrogation; establishes 'the principle that no one can be deemed guilty before a people's court has tried him in accordance with law' in Article 12; advances 'the date for lawyers' involvement in criminal proceedings'; reforms 'the procedures of criminal adjudication, replacing those characterised by interrogations by judges with means of hearing prosecution and defence arguments'; and introduces 'provisions on more humane means of enforcing death sentences, such as the use of injections'.⁴⁰¹

Moreover, the 1997CL also attaches importance to the prohibition of the crime of torture. It includes retention 'of the crime of extorting confessions by

³⁹⁷ 'Summary Record of the 251st Meeting: China. 05/06/96', CAT/C/SR.251 [4]; 'Summary Record of the 419th Meeting: China, Poland. 12/05/2000', CAT/C/SR.419 (China, Poland); 'Summary Record of the Second Part of the 423rd Meeting: China. 09/05/2000', CAT/C/SR.423/Add.1 (China); 'Summary Record of the Public Part of the 254th Meeting: China, Croatia. 10/05/96', CAT/C/SR.254/China/B (China, Croatia)

³⁹⁸ 'Summary Record of the 251st Meeting: China. 05/06/96', CAT/C/SR.251[1](China)

³⁹⁹ 'Second Periodic Reports of States Parties Due in 1993: China. 15/02/96', CAT/C/20/Add.5[6-7](China)

⁴⁰⁰ Ibid.[7]

⁴⁰¹ 'Third Periodic Reports of States Parties Due in 1997: China. 05/01/2000', CAT/C/39/Add.2[7](China)

torture and the crime of physically abusing prisoners' and 'introduction of the crime of the use of force by judicial personnel to extract testimony'.⁴⁰² It explicitly stipulates 'that those who extort confessions by torture, extract testimony from witnesses by force or physically abuse prisoners shall be punished more severely'; and those 'who cause injury, disability or death through the above three crimes shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than 10 years'.⁴⁰³

The State Council's Regulations on the Use of Police Instruments and Weapons by People's Police in 1996 clearly defines 'the circumstances in which police instruments or weapons are to be used and the relevant procedures'. As Article 14 stipulated, 'people's police who cause unnecessary personal injury or death or loss of personal property through unlawful use of police instruments or weapons shall be punished by law; those whose acts do not constitute a criminal offence shall be subject to administrative discipline'.⁴⁰⁴ The victims of these crimes shall be compensated pursuant to the 1994SCL.

In practice, China's judicial bodies have taken measures to prevent the incidence of torture in judicial proceedings. These are institutional improvement;⁴⁰⁵ enhancement of 'the quality of judicial personnel through education and rectification';⁴⁰⁶ a supervisory system that was established in the People's Courts of China to reinforce the supervision over the administration of justice;⁴⁰⁷ and intensification of 'the practice of open trials and their placement under social and public scrutiny'.⁴⁰⁸ They help to 'prevent torture and other cruel, inhuman or degrading treatment towards defendants, and make public acts of torture or extortion of confessions by torture by judicial personnel during criminal proceedings' and 'avoid the occurrence of similar incidents'.⁴⁰⁹

By Article 3(1), China has the duty not to 'expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Its competent authorities

⁴⁰² Ibid.[8]

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.[9]

⁴⁰⁵ Ibid.[10(a)]

⁴⁰⁶ Ibid.[10(b)]

⁴⁰⁷ Ibid.[10(c)]

⁴⁰⁸ Ibid.[10(d)]

⁴⁰⁹ Ibid.

‘shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights’ to determine ‘whether there are such grounds’ under Article 3(2). This pattern of human rights violations ‘refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.⁴¹⁰ The importance of Article 3 appears to be the non-return nature. The extradition treaties between China and other countries stipulated that ‘these instruments do not interfere with the obligations undertaken and rights enjoyed by the two sides under multilateral treaties’.⁴¹¹ This tends not to affect the application of this non-return provision.

Article 4(1) emphasises the obligation of State parties to ensure that ‘all acts of torture’, ‘an attempt to commit torture’ and ‘an act by any person which constitutes complicity or participation in torture’ are ‘offences under its criminal law’. Article 4(2) requires the duty to punish them ‘by appropriate penalties’ in the light of ‘their grave nature’.

As a State party, China has adopted administrative and judicial means to punish ‘anyone guilty of such an act’ and ‘specified the punishment commensurate to the severity of the crime’.⁴¹² It also ‘adopted legislation prohibiting judicial organs and their personnel from using torture’, e.g., 1995JL Article 30;⁴¹³ imposing strict administrative discipline and legal prosecution on the exercise of police and procuratorate authority, e.g., 1995PPL Article 22⁴¹⁴ and 1994PL Article 33⁴¹⁵. The MOPS and SPP reinforced ‘their coordination in the investigation of the use of torture in interrogation’.⁴¹⁶ ‘The 1994PL protects the lawful rights of prisoners and explicitly forbids their being tortured under whatever pretext’, such as Articles 6, 7 and 14.⁴¹⁷ The MOJ ‘promulgated a series of special regulations, such as the Provisional Scheme to Reward or Penalize Personnel in Judicial and Administrative Systems, thereby applying to acts of beating, abusing or subjecting prisoners to corporal punishment or mistreatment specific disciplinary actions that

⁴¹⁰ CAT Article 1(1)

⁴¹¹ ‘Third periodic reports of States parties due in 1997: China. 05/01/2000’, CAT/C/39/Add.2/[12]

⁴¹² ‘Second periodic reports of States parties due in 1993: China 15/02/96’, CAT/C/20/Add.5/[10]

⁴¹³ *Ibid.*/[11]

⁴¹⁴ *Ibid.*/[12]

⁴¹⁵ *Ibid.*/[13]

⁴¹⁶ *Ibid.*/[14]

⁴¹⁷ *Ibid.*/[15]

could range from warning, demerit, demotion, transfer or probation all the way to dishonourable discharge. Any behaviour that constitutes an offence against the law shall be subject to criminal investigation.’⁴¹⁸ Such violations, causing any injury or death, lead to State compensation, the specific procedure of which is provided for in 1994SCL Article 15.⁴¹⁹

More importantly, the 1997CL introduced the crime of extracting testimony by force and amended ‘the punishment given to those who cause death through extortion of confessions by torture’, ‘the provisions on the applicable charges and punishment for persons who cause injury, disability or death through unlawful detention’ and ‘on the applicable charges and punishment for abuses of prisoners that cause injury, disability or death’.⁴²⁰ This appears to aggravate relevant punishments to prohibit torture.

Article 5 entails for China the duty to take necessary measures to establish its jurisdiction over the offences referred to in Article 4 in several cases. 1997CL Articles 6 and 9 ‘constitute the legal basis for the exercise of jurisdiction by China over the crimes’ described in Article 4.⁴²¹

Furthermore, Article 7 legally obligates China to ‘submit the case to its competent authorities for the purpose of prosecution’ without extradition. Since the current international extradition treaties that China has signed prevent it from extraditing its own nationals, China must submit the case involving the extradition of persons with Chinese citizenship ‘to its competent departments with a view to initiating criminal proceedings against and punishing the person as appropriate’ by its domestic laws.⁴²² A good example is Article 5 of the Extradition Treaty between the People's Republic of China and the Russian Federation.⁴²³

By Article 8, China should undertake the duty to include such offences referred to in Article 4 as ‘extraditable offences in every extradition treaty to be concluded between them’. China has included ‘torture as an extraditable offence when it signs an extradition treaty with another country’.⁴²⁴ For example, Article 2

⁴¹⁸ Ibid./[16]

⁴¹⁹ Ibid./[17]

⁴²⁰ Ibid./[14]

⁴²¹ ‘Third Periodic Reports of States Parties Due in 1997: China. 05/01/2000’, CAT/C/39/Add.2[5-58](China)

⁴²² Ibid./[19]

⁴²³ Ibid.

⁴²⁴ ‘Second Periodic Reports of States Parties Due in 1993: China. 05/01/2000’, CAT/C/39/Add.2/[21](China)

of an extradition treaty between China and Thailand in 1993 stipulates that an extraditable crime is 'liable to one or more years of imprisonment or other forms of detention or more severe punishment.'⁴²⁵ The 'conditions for which extradition may be refused do not include the crime of torture' under Articles 3 and 4.⁴²⁶ Other extradition treaties respectively signed with the Russian Federation and Belarus in 1995 'also contain similar provisions'.⁴²⁷ Moreover, 'any person within the territory of China found to have committed a crime punishable by law will be treated as a criminal by the judiciary' and 'the criminal may be extradited to a relevant country for punishment' under appropriate circumstances.⁴²⁸ 'In practice, China also cooperates with some countries in extraditing or repatriating suspect criminals' according to relevant international conventions acceded to by China, including the CAT.⁴²⁹

Moreover, all of the obligations incurred in this treaty must not 'prejudice to...any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion' under Article 16. This tends to stress the duty to prohibit such treatment in all circumstances. As indicated by the State's reports, the cautious application of the death penalty by substantive and procedural laws appears to contribute to the prohibition.⁴³⁰

Specifically, 1997CL Article 48 stipulates, '[T]he death penalty shall only be applied to criminals who have committed the most heinous crimes. If the immediate execution of a criminal condemned to death is not deemed necessary, a two-year stay of execution may be pronounced simultaneously with the imposition of the death sentence.' 'All death sentences except for those which according to law must be decided' by the Supreme People's Court shall be submitted to the SPC for approval. A death sentence with a stay of execution may be decided or approved by a higher people's court.'⁴³¹

⁴²⁵ Ibid.[22]

⁴²⁶ Ibid.

⁴²⁷ Ibid.[23]

⁴²⁸ Ibid.[24]

⁴²⁹ 'Third Periodic Reports of States Parties Due in 1997: China. 05/01/2000', CAT/C/39/Add.2(China)[22]

⁴³⁰ Ibid./[54-58]

⁴³¹ 1997CL Article 48

1996CPL Article 212 ‘stipulates that a death penalty is to be executed by either firing squad or lethal injection. A death penalty may be carried out on the execution ground or inside a prison. The execution of death sentences shall be announced but shall not be held in public.’⁴³² 1997CL Article 50 stipulates: ‘[I]f a person sentenced to death with a stay of execution does not deliberately commit a crime during the period of suspension, his punishment shall be commuted to life imprisonment upon the expiration of that two-year period. If he performs meritorious service, his punishment shall be commuted to fixed-term imprisonment of not less than 15 years and not more than 20 years upon the expiration of that two-year period. If it is verified that he has deliberately committed further crime, the death penalty shall be executed upon the approval’ of the SPC.⁴³³ This ‘death sentence is China’s cautious way to reduce executions’.⁴³⁴

The literal understanding of Article 1 seems to exclude the death penalty from the scope of torture, whereas the same is not the case with acts of cruel, inhuman or degrading treatment or punishment both in Article 16 and in practice. Many documents submitted to the Committee against Torture referred to norms concerning the application of the death penalty.⁴³⁵ They touch upon the extradition of capital offenders, effective measures for abolition, as well as the method and means of execution.⁴³⁶ The ATCom frequently provoked death penalty questions to comment on them⁴³⁷ and appears to directly relate them to the international treaty obligations of State parties. The above practice tends to show the likelihood that the death penalty might be interpreted to be within the scope of the CAT. Hence, the obligations that China should undertake under this treaty appear to apply to death penalty cases.

The possibility appears to bring the *Soering* understanding relating to the ‘death row phenomenon’, e.g., prolonged detention before execution.⁴³⁸ The US understood that international law did not prohibit the death penalty or consider the

⁴³² ‘Third Periodic Reports of States Parties Due in 1997: China. 05/01/2000’, CAT/C/39/Add.2(China)[55]

⁴³³ Ibid./[56]

⁴³⁴ Ibid./[57]

⁴³⁵ ‘Summary Record of the 416th Meeting: China. 18/05/2000’, CAT/C/SR.416[20,34](China); ‘Summary Record of the 419th Meeting: China, Poland. 12/05/2000’, CAT/C/SR.419 (China); ‘Third Periodic Reports of States Parties Due in 1997: China. 05/01/2000’, CAT/C/39/Add.2(China)[14, 54, 57]

⁴³⁶ Schabas/2002/194

⁴³⁷ ‘Summary Record of the Public Part of the 252nd Meeting: China. 08/05/96’, CAT/C/SR.252/Add.1[22](China)

⁴³⁸ Lillich, in *AJIL*/1991/128

CAT to restrict or prohibit its application. On the basis of this reasoning, it formulated a general reservation to prevent cruel, inhuman or degrading treatment or punishment only in the sense of those compatible with its internal laws. The US retains the death penalty as a lawful sanction and appears to exclude this penalty itself from the extent of cruel, inhuman or degrading treatment or punishment. Finland, the Netherlands and Sweden objected to this reservation mainly because its attempt to invoke internal laws to escape international obligations violates the general principle of treaty interpretation.⁴³⁹ This reasonable objection appears to indicate that both 'death row phenomenon' and this penalty itself might fall into the scope of the CAT, considering the same requirements of progressive abolition under international law.

Under Article 19, China should submit to the ATCom periodic reports of the measures it has taken and 'supplementary reports every four years on any new measures' if being requested. This provided for a supervision system of this treaty with individual complaints. As a State party, China has faithfully fulfilled this obligation, e.g., by submitting reports.⁴⁴⁰ China attached great importance to its reporting obligation under the CAT. China had ratified the CAT in 1988 and one year later had submitted its first report, which had been followed, in 1992, by a supplementary report. China's second periodic report was presented in December 1995. The third periodic report had been drafted in close consultation with the SPC, MOPS, MOJ and relevant bodies. It had been drawn up in accordance with the General Guidelines Regarding the Form and Contents of the Periodic Report to be submitted by States parties and contained replies to the questions raised by the ATCom during its consideration of previous reports.⁴⁴¹

2.5 The CRC

The CRC, composed of 54 Articles, provided for substantive rights for children and implementation mechanisms. China signed it on 29th August 1990, followed by ratification on 29th December 1991.⁴⁴² Formally from its entry into force in China

⁴³⁹ Schabas/2002/197

⁴⁴⁰ e.g., 'Third Periodic Reports of States Parties Due in 1997: China. 05/01/2000', CAT/C/39/Add.2

⁴⁴¹ 'Summary Record of the 416th Meeting: China. 18/05/2000', CAT/C/SR.416

⁴⁴² 'Initial Reports of States Parties Due in 1994: China. 01/08/95', CRC/C/11/Add.7[1](China)

on 1st April 1992⁴⁴³, China began to undertake a series of treaty obligations as a party.

Several primary obligations that the CRC entails for China seem to be general principles. Article 2 requires China to protect all the rights of children in the CRC ‘against all forms of discrimination’. This involves the principle of non-discrimination widely recognised in major international human rights treaties. The 1982 Constitution, Rights and Interests of Women Act, Protection of Minors Act, Marriage Act, Compulsory Education Act, General Rules of Civil Law and the relevant administrative regulations and systems make an overall framework to protect this principle.⁴⁴⁴ Moreover, ‘[A]ll Government departments and public organizations, including children's organizations, comply fully with these constitutional principles in their framing, execution and supervision’ of the relevant activities.⁴⁴⁵ The ‘special preferential measures and political concessions’ have also been made to ensure the rights of children from ethnic minorities, in poor districts, or disabled, to be effectively safeguarded.⁴⁴⁶ The 1982 Constitution and GRCL equally guarantee the rights of foreign and refugee children and other related subjects ‘on an equal footing’.⁴⁴⁷

Under Article 3(1), ‘the best interests of the child shall be a primary consideration’ in ‘all actions concerning children’. This principle is generally accepted in both domestic and international laws. In China, the 1982 Constitution, General Principles of Civil Law, 1997 CL, PMA, MA, Education Act, HA, and other statutes set a solid and effective legal framework for the protection of children’s best interests.⁴⁴⁸ On this basis, the comprehensive ‘implementation of the Children’s Programme has resulted in broad social acknowledgement of the ‘children first’ principle’.⁴⁴⁹ In the administration of justice, the public security agencies, PPs, PCs, and all social welfare institutions for children firmly adhere to the principle of the ‘best interests of the child’, which contributes to that ‘China fully implements the principle’.⁴⁵⁰

⁴⁴³ Ibid.

⁴⁴⁴ Ibid./[27-32]; ‘Second Periodic Report of States Parties Due in 1997’, CRC/C/83/Add.9/[27-31]

⁴⁴⁵ ‘Initial Reports of States Parties Due in 1994: China. 01/08/95’, CRC/C/11/Add.7/[31]

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid./[32]

⁴⁴⁸ Ibid./[33-34]; ‘Second Periodic Report of States Parties Due in 1997’, CRC/C/83/Add.9/[33]

⁴⁴⁹ ‘Second Periodic Report of States Parties Due in 1997’, CRC/C/83/Add.9/[34]

⁴⁵⁰ Ibid./[34-39]

Article 6 entails for China the obligation to ‘recognize...the inherent right to life’ and ‘ensure to the maximum extent possible the survival and development of the child’. The 1982 Constitution, 1997CL, GRCL, RIWA, PMA and MA, amount to the primary legislative basis in this aspect.⁴⁵¹ 1997CL Article 131 explicitly ‘states that the State shall protect citizens’ personal, democratic and other rights, and shall not allow any individual or agency to violate them unlawfully’.⁴⁵² In implementation, ‘China has consistently placed the safeguarding of children’s rights to life’ ‘at the head of its efforts to protect the rights and interests of children’.⁴⁵³

Moreover, Article 37(a) provides for other important obligations, which is related to the death penalty and forced labour. It obligates China to prohibit torture or other cruel, inhuman or degrading treatment or punishment from being inflicted on children in any circumstances, especially in the implementation of capital punishment or forced labour. The 1982 Constitution and ‘other important pieces of legislation lay down clear, detailed provisions’ on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment,⁴⁵⁴ as China’s State reports submitted to the ATCom showed. In practice, China has ‘specially instituted methods for dealing with cases involving minors’ to ‘tighten the ban on torture’.⁴⁵⁵ Where a State agency or functionary abuses authority and engages in torture to violate a citizen’s right to physical integrity, the victim may seek compensation, by the 1982 Constitution and 1994SCL.⁴⁵⁶ Together with a high regard of the competent authorities for children’s rights, ‘torture of children does not occur in China’.⁴⁵⁷

Article 37(a) also excludes the imposition of the death penalty and of life imprisonment without the possibility of release ‘for offences committed by persons below eighteen years of age’. China is legally obligated not to impose any of them on such persons. The Criminal Law of the PRC in 1979, however, stipulated that

⁴⁵¹ ‘Initial Reports of States Parties Due in 1994’, CRC/C/11/Add.7(China)[37-40]

⁴⁵² Ibid./[38]

⁴⁵³ Ibid./[37-43]

⁴⁵⁴ ‘Second Periodic Report of States Parties Due in 1997: China. 15/07/2005’, CRC/C/83/Add.9(China)[41]

⁴⁵⁵ ‘Initial Reports of States Parties Due in 1994: China. 01/08/95’, CRC/C/11/Add.7(China)[78]; ‘Second Periodic Report of States Parties Due in 1997: China. 15/07/2005’, CRC/C/83/Add.9(China)[112-116]

⁴⁵⁶ ‘Initial Reports of States Parties Due in 1994: China. 01/08/95’, CRC/C/11/Add.7[79]

⁴⁵⁷ ‘Second Periodic Report of States Parties Due in 1997: China. 15/07/2005’, CRC/C/83/Add.9(China)[112]

⁴⁵⁷ ‘Initial Reports of States Parties Due in 1994: China. 01/08/95’, CRC/C/11/Add.7[79]

‘in the case of particularly serious offences committed by juveniles between the ages of 16 and 18, the death penalty could be imposed and suspended for two years’.⁴⁵⁸ This clearly breaches CRC Article 37(a) and was amended by the 1997CL. 1997CL Article 49 states that capital punishment ‘shall not be imposed on persons who were under 18 at the time they committed the offence’. This guarantees the principle that no capital punishment shall be imposed on juvenile offenders.⁴⁵⁹

Under the 1997CL, moreover, ‘persons below eighteen years of age’ may be sentenced to life imprisonment. But ‘life imprisonment is not an endless sentence with no possibility of release’.⁴⁶⁰ If ‘in the course of serving a sentence a convicted offender conscientiously abides by prison regulations, is reformed through education and expresses genuine remorse or performs meritorious service, his or her sentence may be commuted’ to fixed-term imprisonment.⁴⁶¹ These equally apply to ‘persons below eighteen years of age’ and leave no room for the application of life imprisonment with no possibility of release to minors.

Article 38 requires China to ‘take all feasible measures to ensure protection and care of children who are affected by an armed conflict’ under its international humanitarian obligations. Although there is no explicit provisions on the protection of children in armed conflict in Chinese legislation, China is a party to the Geneva Convention relative to the Protection of Civilian Persons in Time of War. It respects and fulfils its due obligations in this respect under the GC4 in practice.⁴⁶²

Furthermore, CRC Article 40 deals with the administration of juvenile justice and imposes on China the relevant obligations. 1997CL Articles 3, 1996CPL Articles 9 and 12 are respectively consistent with CRC Article 40(2)(a), (2)(b)(vi) and (2)(b)(i).⁴⁶³ The reformed method of criminal trials also conforms to CRC Article 40(2)(b)(iv).⁴⁶⁴ The specific procedures set out by China’s judicial organs on the handling of juvenile criminal cases⁴⁶⁵ further contribute to protecting the

⁴⁵⁸ ‘Second Periodic Report of States Parties Due in 1997: China. 15/07/2005’, CRC/C/83/Add.9(China)[322(a)]

⁴⁵⁹ Ibid./[322]

⁴⁶⁰ Ibid./[323(b)]

⁴⁶¹ Ibid.

⁴⁶² ‘Initial Reports of States Parties Due in 1994: China. 01/08/95’, CRC/C/11/Add.7[210]

⁴⁶³ ‘Second Periodic Report of States Parties Due in 1997’, CRC/C/83/Add.9(China)[275, 277, 291]

⁴⁶⁴ Ibid./[279]

⁴⁶⁵ Ibid./[281-290]



rights of juvenile offenders in the administration of justice provided in CRC Article 40.

In terms of practical enforcement, China ‘takes the protection of minors’ lawful interests during judicial proceedings extremely seriously’.⁴⁶⁶ Apart from various activities undertaken by domestic human rights institutions to raise young people’s legal awareness⁴⁶⁷, the State public security and judicial departments, PPs and PCs strengthen the links between them for ‘their collective supervision, education, reform and rehabilitation of juvenile offenders’.⁴⁶⁸ Chinese ‘juvenile cases are generally heard in juvenile courts’ and the hearing of these cases differs from trials in adult courts.⁴⁶⁹ The Higher People’s Courts and Intermediate People’s Courts also change ‘the usual practice of criminal cases being tried where the crime was committed’ and assign ‘juvenile criminal cases originally scheduled for trial’ in local PCs to just one or a few PCs to eliminate sentencing imbalances in juvenile cases.⁴⁷⁰ Numerous procuratorial bodies have also been established to oversee the investigations into and hearings on such cases and monitor the enforcement of penal sentences and the operations of Reeducation-through-labour institutions for juvenile offenders.⁴⁷¹

This treaty has a ‘weak implementation system’, ‘which is essentially a self-assessment based on the submission of periodic reports’ by States parties.⁴⁷² Under Article 43, the Committee on the Rights of the Child was established to examine ‘the progress made by States parties in achieving the realization of the obligations’.⁴⁷³ Article 44 obligates China to submit to the CRCCom ‘reports on the measures...which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights’.⁴⁷⁴ This is the only system for the CRCCom to supervise the CRC, different from the CAT and CERD.

⁴⁶⁶ ‘Initial Reports of States Parties Due in 1994’, CRC/C/11/Add.7(China)[211]

⁴⁶⁷ ‘Second Periodic Report of States Parties Due in 1997’, CRC/C/83/Add.9(China)[299]

⁴⁶⁸ ‘Initial Reports of States Parties Due in 1994’, CRC/C/11/Add.7(China)[212]

⁴⁶⁹ ‘Second Periodic Report of States Parties Due in 1997’, CRC/C/83/Add.9(China)[292-297]

⁴⁷⁰ Ibid./[298]

⁴⁷¹ ‘Initial Reports of States Parties Due in 1994’, CRC/C/11/Add.7(China)[214-215]

⁴⁷² Fottrell, in Fottrell/2000/6

⁴⁷³ ‘Concluding Observations: China 24/11/2005’, CRC/C/CHN/CO/2; ‘Summary Record (Partial) of the 1080th Meeting: Algeria, Australia, China, Denmark, Finland, Hong Kong (China), Russian Federation, Uganda. 24/10/2005’, CRC/C/SR.1080; ‘Summary Record of the 1064th Meeting: China. 03/10/2005’, CRC/C/SR.1064; ‘Concluding Observations (Unedited Version): China, Hong Kong (China), Macau (China). 30/09/2005’, CRC/C/15/Add.271; CRC/C/SR.1062; ‘Summary Record of the 300th Meeting: China. 20/06/96’, CRC/C/SR.300; ‘Summary Record of the 298th Meeting: China. 19/06/96’, CRC/C/SR.298

⁴⁷⁴ ‘Initial Reports of States Parties Due in 1994’, CRC/C/11/Add.7(China); ‘Second Periodic Report of States

2.6 The CERD

China became a party to the CERD from the date of its accession on 28th January 1982.⁴⁷⁵ The CERD includes both substantive and implementation provisions in the total of 25 Articles. Among them, Article 5(a) implicitly relates to the death penalty. It requires States parties to ‘undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction...to equality before the law’. This appears to broadly express the right to equal treatment before the tribunals, without mentioning more details like a fair trial. It tends to ‘guarantee the right of everyone’ to seek ‘justice before a competent organ not to be discriminated against’,⁴⁷⁶ applicable to all capital trials.

The implementation system of this treaty contains both reporting and individual petitions in accordance with Article 9. It entails an obligation to submit to the SG of the UN, for consideration by the Committee on the Elimination of Racial Discrimination established under Article 8, ‘a report on the legislative, judicial, administrative or other measures’. The ERDCom sometimes took up death penalty issues.⁴⁷⁷ Hence, China should meet the above-mentioned requirements to fulfil relevant legal obligations without reservations.

2.7 Regional human rights standards

On the regional level, there are several human rights treaties with important provisions pertinent to the abolition of capital punishment. They play an important role in the regional progress of abolishing capital punishment.

2.7.1 The ECHR

Parties Due in 1997’, CRC/C/83/Add.9(China)

⁴⁷⁵ OHCHR 7

⁴⁷⁶ Lerner/1980/56

⁴⁷⁷ ‘Summary Record of the 1190th Meeting: Guatemala. 10/03/97’, CERD/C/SR.1190 [21]; ‘Summary Record of the Public Part of the 1191st Meeting: Burundi, Guatemala.07/04/97’, CERD/C/SR.1191 [19]; ‘Summary Record of the 1198th Meeting: Pakistan. 14/03/97’, CERD/C/SR.1198[13]; ‘Summary Record of the 1209th Meeting: Afghanistan, Bahamas, Cameroon, Dominican Republic, Jordan, Nepal, Swaziland, United Kingdom of Great Britain and Northern Ireland. 09/05/97’, CERD/C/SR.1209 [12]; ‘Summary Record of the 991st Meeting: Holy See. 10/08/93’, CERD/C/SR.991[23]

As one of the most fundamental provisions, the ECHR safeguards the right to life and sets out when the intentional deprivation of life may be justified in Article 2. Article 2(1) stressed the positive obligation of State parties not to deprive anyone of the life ‘intentionally save in the execution of a sentence of a court following...conviction of a crime for which this penalty is provided by law’. There are two explicit limitations that death sentences must be pronounced by a ‘court’ and be ‘provided for by law’. This appears not to permit derogation in peacetime under Article 15.

Article 3 provided for the prohibition of torture or inhuman or degrading treatment or punishment in an explicit approach. This appears not to consider that death penalty per se constitutes such treatment.⁴⁷⁸

ECHR Article 6 includes a range of procedural guarantees of a fair trial, with the similar formulation of ICCPR Article 14. Specifically, Article 6(1) specified the right to a fair trial that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ It requires an ‘impartial tribunal established by law’ to ensure a fair trial, equally applicable to all capital cases. Article 6(2) stipulates that everyone ‘charged with a criminal offence shall be presumed innocent until proved guilty according to law’. Article 6(3) provided for five minimum rights of persons charged with a criminal offence. The first is the right ‘to be informed promptly, in a language’ which the accused ‘understands and in detail, of the nature and cause of the accusation against him’. The second is ‘to have adequate time and facilities for the preparation of his defence’. The third is ‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require’. The fourth is ‘to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’. The fifth is ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court’.

ECHR Article 7 contains the principle of non-retroactivity, similar to ICCPR Article 15. No heavier penalty shall ‘be imposed than the one that was applicable at

⁴⁷⁸ Kindler v. Canada(CCPR/C/48/D/470/1991)[15.1]

the time the criminal offence was committed’, which ‘shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.’ This principle equally applies to capital punishment.

2.7.2 The ECHR-PN6

The ECHR-PN6 is ‘an agreement to abolish the death penalty in peacetime’.⁴⁷⁹ This deals with the general tendency of abolition in nine provisions.

Article 1 stipulates: ‘[T]he death penalty shall be abolished. No one shall be condemned to such penalty or executed.’ This entails for State parties the positive obligations to abolish the death penalty and to prevent execution from being imposed on anyone. There seems no difference on such obligations between peacetime and wartime.

However, Article 2(1) added that ‘[A] State may make provision in its law for the death penalty in respect of acts committed in time of war or imminent threat of war.’ This leaves the possibility of applying the death penalty in wartime as an exception. Yet this is not unlimited because ‘such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions’ as a limitation in Article 2(2). Moreover, the specific list of ‘in time of war or imminent threat of war’ aims to disallow States parties to extend the applicable extent of this penalty to various crises on the pretext that war is remotely foreseeable.⁴⁸⁰ Yet it is not clear who or when to establish when there is a state of war or when imminent threat occurs, whereas the power ‘remains with the State which holds in this matter a large margin of appreciation, but under tight control and review’.⁴⁸¹

Furthermore, there is no derogation or reservation under Articles 3 and 4. Article 3 does not allow for any derogation from the provisions of the ECHR-PN6 under ECHR Article 15. This appears to indicate that death sentences can be lawfully applied in wartime and not in emergency circumstances.

Additionally, Article 6 requires that the other provisions ‘shall be regarded as additional articles’ to the ECHR and all of the provisions ‘shall apply accordingly’.

⁴⁷⁹ AI 1

⁴⁸⁰ Schabas/2002/289

⁴⁸¹ Sapienza, in Ramcharan/1985/291-292

This appears to leave no room for the imposition of capital punishment in wartime without satisfying the requirements of Article 2(1).

2.7.3 The ECHR-PN13

The ECHR-PN13 provided for the abolition of the death penalty in all circumstances. Article 1 stipulated the abolition of the death penalty with the same formulation as ECHR-PN6 Article 1. This underlines the right to life to be guaranteed and establishes the principle of abolishing the death penalty in both peacetime and wartime.

Articles 2 and 3 respectively prohibit any derogation or reservation. Article 4 deals with the territorial application to facilitate a rapid ratification, acceptance or approval by the States concerned, and to permit formal withdrawal or modification without the effect of reintroducing the death penalty in territories.

2.7.4 The ACHR

ACHR⁴⁸² Article 4 deals with the right to life in detail. This appears to reveal a clear tendency to protect the right to life and restrict the scope of the death penalty.

Article 4(1) provided for the protection of the right to life by law and from arbitrary deprivation in general. As an exception, ‘the death penalty...may be imposed...pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime’.⁴⁸³ This applies to such ‘countries that have not abolished the death penalty’, which appears to indicate the non-reintroduction principle in Article 4(2). This principle is also emphasised in Article 4(3), which expressly stated that ‘the death penalty shall not be reestablished in States that have abolished it’. Accordingly, any State cannot reintroduce the death penalty following its abolition from national laws as a party to this treaty.

Article 4(4) explicitly prohibited the application of capital punishment to ‘political offenses or related common crimes’, which tends not to fall into the category of ‘the most serious crimes’. Latin America has the tradition to be

⁴⁸² 1144/UNTS/123

⁴⁸³ ACHR Article 4(2)

hospitable to the notion of political asylum and of refusal to extradite due to the political motivation, although even in Latin America there is no consensus on the term's definition.⁴⁸⁴

The use of the death penalty on the elderly is excluded under the ACHR as the only international instrument to prohibit such imposition. ACHR Article 4(5) stipulated that the death penalty 'shall not be imposed upon persons who, at the time the crime was committed, were...over 70 years of age'. It also excludes 'persons who, at the time the crime was committed, were under 18 years of age' from being imposed on and 'pregnant women' from being applied. Hence, Article 4(5) adds the category over the age of seventy to the groups of protected persons, including juveniles and pregnant women.

Article 4(6) stressed the right of persons condemned to death to 'apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases'. Without conclusion of such a petition by the competent authority, capital punishment shall not be imposed. This provides for the likelihood of amnesty, pardon or commutation and implies that such procedures should be exhausted before the execution of capital punishment.

Article 5 addressed the right to humane treatment. Article 5(2) further stated the prohibition of torture, cruel, inhuman, or degrading punishment or treatment. This excluded the possibility of such inhuman treatment inflicted on anyone, especially persons facing the death penalty.

Article 8 added 'the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law'. This requires an impartial tribunal established by law to ensure a fair trial, applicable to all capital cases. Equally, ACHR Article 27 explicitly confirmed that both the right to life and the judicial guarantees essential for its protection may not be suspended. The Inter-American Court of Human Rights shares the same opinion that 'due process' cannot be suspended in the case of the non-derogable right to life under ACHR Articles 8, 25 and 27(2).⁴⁸⁵

Article 8(2) stipulated that the right of persons 'accused of a criminal offense' to be presumed innocent without being proven guilty by law and to a series of

⁴⁸⁴ Rodley/1999/222

⁴⁸⁵ AHRCourt/1987

minimum guarantees in proceedings ‘with full equality’. The first guarantee is ‘the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court’. The second is ‘prior notification in detail to the accused of the charges against him’. The third is ‘adequate time and means for the preparation of his defense’. The fourth is ‘the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel’. The fifth is ‘the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law’. The sixth is ‘the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts’. The seventh is ‘the right not to be compelled to be a witness against himself or to plead guilty’. The eighth is ‘the right to appeal the judgment to a higher court’.

Article 9 expressly states the freedom ‘from *Ex Post Facto Laws*’, including the principle of non-retroactivity on criminal law. Specifically, a heavier penalty shall not ‘be imposed than the one that was applicable at the time the criminal offence was committed.’⁴⁸⁶ ‘If subsequent to the commission of the offence the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefore.’⁴⁸⁷ This ‘shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations’.⁴⁸⁸ The above principle equally applies to capital punishment.

ACHR Article 10 adopted a simple formulation of the right to compensation, different from ICCPR Article 14(6). It stipulated that every person ‘has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice’.

2.7.5 The ACHR-P-DP

⁴⁸⁶ ECHR Article 7; ACHR Article 9

⁴⁸⁷ ACHR Article 9

⁴⁸⁸ Ibid.; ECHR Article 7

The GA of the OAS adopted it at its twentieth regular session in Resolution 1042 of 8th June 1990. It specified the application of the death penalty in a different approach.

Article 1 states that the death penalty shall not be applied by States parties, 'in their territory to any person subject to their jurisdiction'. This seems to impose on State parties the duty not to apply the death penalty instead of abolition. It is possible for de facto abolitionist States to ratify it without revising their domestic laws. By Article 2(1), they may 'apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature'. This appears to incorporate the death penalty provisions of the GC3, GC4, PA1 and GC4-PA4. Article 2(2) also permits them to make reservations, but requires informing of 'national legislation applicable in wartime' 'upon ratification or accession'.

2.7.6 The ACHPR

The ACHPR was adopted by the OAU in 1981. It contains several articles relating to the death penalty.

It makes no reference to the death penalty, which makes it different from the regional conventions of the European and American systems. But Articles 4, 5 and 7 are likely to involve the application of the death penalty. Article 4 stipulated respect for the right to life of every person and prohibited the arbitrary deprivation of this right. Where capital punishment is a legal sanction, its use appears not to be arbitrary deprivation of the right to life. Otherwise, any death sentences or executions are possible to breach this right.

Article 5 provided for the prohibition of torture, cruel, inhuman or degrading punishment and treatment. This appears to prevent any forms of such treatment in all circumstances, including in the course of the implementation of capital punishment.

Article 7(1) deals with the right of every individual to have his cause heard, which is related to the right to a fair trial in handing death penalty cases. Specifically, Article 7(1)(b) stipulated that every person have 'the right to be

presumed innocent until proved guilty'⁴⁸⁹ by law. Article 7(1)(c) specified 'the right to defence, including the right to be defended by counsel of his choice'. Article 7(1)(d) stipulated that everyone shall have 'the right to be tried within a reasonable time by an impartial court or tribunal' in all cases. Such provisions are applicable to any of both capital trials and others as well.

Article 7(2) stipulated that '[N]o one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed.' Meanwhile, '[N]o penalty may be inflicted for an offence for which no provision was made at the time it was committed.' It appears to formulate the principle of non-retroactivity, universally applicable to all punishments.

2.7.7 The African Charter on the Rights and Welfare of the Child

It addresses the rights of children and makes an explicit reference of death sentences. Among the 48 articles of the ACRWC, Article 5 is the only one with direct reference to the death penalty.

Article 5(1) stipulated that the inherent right to life of every child 'shall be protected by law'. This requires States parties to protect the right to life by law. Since 'a child means every human being below the age of 18 years' according to the definition of a child in Article 2, the protection is directed at the group of persons 'below the age of 18 years'.

Article 5(3) prevented any children from being pronounced death sentences. This excluded the category of children 'below the age of 18 years' from being imposed on the death penalty.

Furthermore, Article 16 specified the protection against child abuse and torture. Article 16(1) entails for States parties the obligation to 'take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment'. This equally prevents such treatment from happening in the implementation of the death penalty.

Additionally, Article 17 deals with the administration of juvenile justice. This contains a range of procedural rights to ensure a fair trial in cases involving children, including those facing the death penalty.

⁴⁸⁹ ACHPR Article 7(1)(b)

2.7.8 The Arab Charter on Human Rights

The ACharter addresses the right to life and even the death penalty. Related provisions can be found in Articles 5, 10, 11, 12 and 13.

Article 5 protects the right to life, liberty and security of every individual from being unlawfully deprived. This appears to stress the legal protection of such rights more than the requirement of any other means to protect them.

Article 10 stipulated that the ‘death penalty may be imposed only for the most serious crimes and anyone sentenced to death shall have the right to seek pardon or commutation of the sentence’. This restricts the applicable scope of the death penalty in general and safeguards the right of those facing the death penalty to seek pardon or commutation of death sentences.

Article 12 provided for three categories of persons excluded from the imposition of the death penalty. These are persons under 18 years of age, pregnant women before delivery and nursing mothers ‘within two years from the date on which’ to give birth to babies. This further limits the specific use of the death penalty, apart from its general scope.

Article 13 requires States parties to ‘protect every person in their territory from being subjected to physical or mental torture or cruel, inhuman or degrading treatment’, including ‘medical or scientific experimentation’ ‘without his free consent’. Article 13(a) entails for them the obligation to ‘take effective measures to prevent such acts’ as ‘torture or cruel, inhuman or degrading treatment’ and to ‘regard the practice thereof, or participation therein, as a punishable offence’. The prohibition of such treatment is applicable to any circumstances without limitations. This appears to equally apply to the implementation of the death penalty.

2.8 The GC3, GC4, PA1 and PA2

2.8.1 The GC3

The GC3 principally governs the protection of prisoners of war in international law. China signed it on 10th December 1949 and ratified it on 28th December 1956. Accordingly, China has the obligation to meet the requirements of this treaty as a party.

According to Article 82, prisoners of war are 'subject to the laws, regulations and orders in force in the armed forces of the Detaining Power'. This appears to indicate the possibility of the imposition of the death penalty on these prisoners according to the effective laws of this Power, which was specified mainly by Articles 100 and 101. Article 100 requires the detaining power to inform prisoners of war and the Protecting Powers 'as soon as possible of all offences...punishable by death' under its laws. No other offences shall 'be made punishable by death without the concurrence of the Power upon which the prisoners of war depend'. This obligation in capital cases appears to strengthen the general provision that such prisoners 'are subject to the same penalties as those imposed on the 'members of the armed forces of the Detaining Power' in Articles 87 and 102.

Furthermore, Article 100(3) also obligates that the death sentence 'cannot be pronounced on a prisoner of war unless the attention of the court has...been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will'. The said court is mostly military because such prisoners 'shall be tried only by a military court, unless the existing laws...expressly permit the civil courts to try' them under Article 84. The above-mentioned fact shall be taken into consideration when the court is 'fixing the penalty' according to Article 87(2). This clause also provided that this court 'shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed'. In this sense, the death penalty is not compulsory for such prisoners.

Article 101 stipulated that the death 'sentence shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives' notices if the sentence being 'pronounced on a prisoner of war'. This establishes a moratorium of at least six months between the imposition and the execution of the death penalty. This appears to ensure sufficient time for 'the prisoner's own government to be informed of the sentence, through the protecting power'⁴⁹⁰. Article 107 also detailed the requirements of the communication in all

⁴⁹⁰ Schabas/2002/217

case involving the death penalty and others, such as Articles 86, 99, 103, 104, 105 and 106, stipulated the rights of these prisoners facing the death penalty in judicial procedures.

Moreover, Article 99 stated that no ‘prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed’. This appears to indicate the non-retroactivity principle.

Article 100 expressly mentions the death penalty in wartime. Specifically, ‘[P]risoners of war and the Protecting Powers shall be informed as soon as possible of the offences which are punishable by the death sentence under the laws of the Detaining Power’. ‘Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend.’

Additionally, the GC3 and GC4 contain the common Article 3. Article 3(1)(d) expressly prohibited ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples’.⁴⁹¹ Such ‘judicial guarantees’ ‘indispensable by civilized peoples’ might be generally summarized as the procedural safeguards of a fair trial. Accordingly, there is no sentence of the death penalty without a fair trial in any capital cases. Meanwhile, This failed to specify the details of these ‘judicial guarantees’, while major international human rights or humanitarian standards appears to indicate what is ‘recognized as indispensable by civilized peoples’.⁴⁹²

2.8.2 The GC4

The GC4 mainly protected civilians in time of war under international law. Since its ratification and accession on the same day as the GC3, China should undertake all of the obligations in this treaty without any reservation.

The general rule of the GC4 is that the ‘penal laws of the occupied territory shall remain in force’ during the occupation.⁴⁹³ But the Occupying Power may

⁴⁹¹ GC3 Article 3; GC4 Article 3

⁴⁹² Schabas/2002/213

⁴⁹³ GC4 Article 64(1)

revise its provisions to ‘maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them’.⁴⁹⁴ This modification of the penal legislation appears to be restricted in two primary aspects in the event of the death penalty. The Occupying Power ‘may impose the death penalty’ only for espionage, ‘serious acts of sabotage against the military installations of the Occupying Power’ or ‘intentional offences which have caused the death of one or more persons’.⁴⁹⁵ The other limitation is that offences punishable by death under the law of the occupied territory entered into force before occupation.⁴⁹⁶

Moreover, the treaty obligates the prosecutor who is seeking the death penalty to call the court’s attention to ‘the fact that the accused is not a national of the Occupying Power’ or bound to it by any duty of allegiance.⁴⁹⁷ GC4 Article 68(4) stated that ‘the death penalty may not be pronounced on a protected person who was under the eighteen years of age at the time of the offence’ in any case. This further forbade the imposition of the death penalty on these persons.

Article 70 tends to protect civilian persons from having the death penalty applied unlawfully in wartime. No protected persons shall ‘be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.’ Nor nationals of ‘the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State’ shall ‘be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.’

GC4 Articles 71 to 78 are relevant to the requirements of a fair trial, which equally apply to all capital cases. Among them, Article 75 addressed the adequate time between sentence and execution for those facing the death penalty to exercise

⁴⁹⁴ GC4 Article 64(2)

⁴⁹⁵ GC4 Article 68(2)

⁴⁹⁶ Ibid.

⁴⁹⁷ GC4 Article 68(3)

the right to appeal or clemency. It provided for no execution of death sentences before the expiration of the same period 'from the date of the receipt...of notification of the final judgment confirming such death sentence, or of an order denying pardon or reprieve'. It also confirmed the right of reasonable time and opportunity to make representations concerned to those sentenced to death.

2.8.3 The PA1

The PA1 addressed a wide scope of legal issues, of which only two clauses relate to China. China became a party from its ratification or accession on 14th September 1983 and should fulfil primary international obligations concerning the death penalty below under this norm.

Article 76(3) legally obligates China the duty to 'avoid the pronouncement of the death penalty' and the executions 'on pregnant women or mothers having dependent infants, for an offence related to the armed conflict'. This appears to exclude two groups of persons, namely, both 'pregnant women' and 'mothers having dependent infants', from pronouncement. It also limits the scope of offences for which the death penalty cannot be pronounced to 'an offence related to the armed conflict'. Accordingly, the ordinary crimes committed during wartime without the feature of 'the armed conflict' appear to fall outside this extent of non-pronouncement or non-execution and may have the death penalty applied.

Meanwhile, Article 77(5) requires China not to execute the 'death penalty for an offence related to armed conflict' committed by 'persons who had not attained the age of eighteen years at the time the offence'. This precludes another category of persons from the application of the death penalty, namely the sole group- 'persons who had not attained the age of eighteen years at the time the offence' from its execution. Unlike the two groups discussed above, such young persons are simply prohibited from execution rather than pronouncement.

2.8.4 The PA2

The PA2 came into force and was ratified or acceded to by China on the same date as the PA1. Among the 28 Articles of the PA2, Article 6 is the only one to address

death penalty issues, involving China's international duties concerning the penalty, in wartime.

Article 6(4) explicitly prohibited the death penalty for 'persons who were under the age of eighteen years at the time of the offence' from being pronounced and for 'pregnant women or mothers of young children' from being carried out. Accordingly, the non-pronouncement of 'persons who were under the age of eighteen years at the time of the offence' appears to leave no room for the carrying out of the death penalty. Yet the prohibition against the carrying out of the death penalty appears to remain the possibility of its pronouncement. Hence, the death penalty for 'pregnant women or mothers of young children' cannot be carried out, but might be pronounced, in time of war.

Article 6(5) entails the obligation to 'grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'. This mentioned the protection of the right to amnesty, without referring to the death penalty. But this amnesty clause is clearly applicable to death penalty cases and other criminal cases, relating to 'the armed conflict'.

2.9 Customary International Law

With the development of public international law, there are obligations for States under customary international law, concerning the death penalty. Generally, customary international norms consist of two factors, of which the objective one is the practice of States consistent with the norm, and the subjective one is *opinio juris*: the acceptance of the norm by these States.⁴⁹⁸ Such norms have a binding effect on all States, including those which have not taken part in the practice but have not objected to it—States are said to have 'acquiesced' in the practice. China was equally bound by those obligations unless it was a persistent objector to the development of the rules.

It is very difficult to show that any particular rule of human rights law is a rule of customary international law. Both establishing the generality of practice and demonstrating that such practice carries with the requisite *opinio juris*, are

⁴⁹⁸ Meron/1989/3-4; Villiger/1985/37[89]; ICJ Reports/1950/Asylum/276; ICJ Reports/1969/44; ICJ Reports/1986/98

exercises which will need to be satisfied. In particular, the mere coincidence of national laws will not, of itself, show the existence of a customary law obligation. Even where a rule can be isolated, showing that it has been violated in an individual case, the absence of a dispute-settlement mechanism is further complication. For China, even if it were shown that there were a human rights rule under customary international law, binding on China, China's resistance to an obligation of implementation of human rights laws would not take the debate very much further, though only for certain points and not for all. Where objection appeared after a customary rule came out, it would not help China even if China would simply say that it had consistently objected to any regime of implementation obligation in this area of the law, which is a claim difficult to dispute. Indeed, the persistent objection before a customary rule comes out, would not help the persistent objector to any human rights obligations after they have been definitely appeared.

Accordingly, although aware that there is some possibility for considering matters from the perspective of customary international law, this thesis will not give much attention to the matter because it is believed to be peripheral to the main thrust of the inquiry, which is to examine China's potential obligations under the ICCPR. It may be helpful from time to time to consider documents or arguments which would contribute to establishing customary law obligations for the purpose of better understanding the treaty obligations which have been undertaken or which might be undertaken by China.

2.9.1 Substantive Limits to Capitally Punishable Offences

2.9.1.1 The protection of the right to life against its arbitrary deprivation

According to the HRCCom, the prohibition against arbitrary deprivation of life requires that the law must strictly control and limit the scope of the death penalty to ensure the right to life.⁴⁹⁹ Since the right to life is the supreme right among all basic and fundamental rights, the protection of it and the prohibition against its arbitrary deprivation appear to be imperative.⁵⁰⁰ This proposition brings several questions:

⁴⁹⁹ GC/6(6)/[3]

⁵⁰⁰ Nsereko, in Ramcharan/1985/245

Are both the right to life and the obligation of States on the protection against arbitrary deprivation of life under customary international law? What is the relationship between the right to life and the protection against arbitrary deprivation of life? Is the right to life with an exception of the death penalty also customary?

The right to life is accepted by customary international law as a universal norm and this is shown in international instruments and general State practice. The right to life provision is recognised in many major international instruments. As 'International Bills of Rights', UDHR Article 3, ICCPR Article 6(1), the ICCPR-OP1-DP⁵⁰¹ and ICCPR-OP2-DP Article 1 pay more attention to the protection of such fundamental human rights as the right to life.

UDHR Article 3 enshrined the right to life provision that '[E]veryone has the right to life, liberty and security of the person.' Without any express limitations on this right, it seems to 'have a neutral stance' on the issue of the death penalty⁵⁰², as one of the contested questions in drafting.⁵⁰³ Yet Article 3 has been frequently cited in resolutions of the GA to promote eventual abolition of the death penalty.⁵⁰⁴ Hence, Article 3 appears to contribute to ultimate abolition of the death penalty and further protection of the right to life.

Such resolutions of the UN as the Safeguards and Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty also deal with the right to life. The Safeguards specified its applicable scope of 'most serious crimes' and precluded new mothers and the insane from being executed at all. This substantial development was strengthened by another resolution, the Safeguards 1996. Both are actually designed for the protection of the right to life against arbitrary life-taking. They were in fact a carefully prepared consensus, since the UN State members would abstain or vote against it if disagreeing with a resolution. Apart from other international human rights law⁵⁰⁵, more important, international humanitarian

⁵⁰¹ 999/UNTS/302

⁵⁰² 'The Capital Punishment and the 'Right to Life' in International Document of Human Rights', UN Doc. A/CONF.87/9[5]

⁵⁰³ Schabas/2002/24

⁵⁰⁴ 'Capital Punishment', UN Doc. A/RES/2393(XXIII); 'Capital Punishment', UN Doc. A/RES/2857(XXVI); 'Capital Punishment', UN Doc. A/RES/32/61; 'Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty', UN Doc. A/RES/44/128

⁵⁰⁵ CAT; CRC

law,⁵⁰⁶ international criminal law⁵⁰⁷ and regional human rights law⁵⁰⁸ also tend to favour the protection and promotion of this right in diverse respects. This appears to show that these States generally accept the norm. Meanwhile, all States in the world not only explicitly or implicitly provide for such norms in national Constitutions or specific branches of their laws, but also apply them practically to protect this right.

In general international law, the right to life has the feature of non-derogability ‘even in time of public emergency which threatens the life of the nation’, as the General Comment No. 06 stressed. This is also evidenced by explicit statements in ICCPR Article 4 (2), ECHR Article 15, ACHR Article 27(1) and the common Article 3 of the GC3 and GC4. Thus, this right ‘has the character of *jus cogens*’, as a Special Rapporteur confirmed.⁵⁰⁹ Moreover, States actively protect the right to life and none of them object to it in practice. This appears to satisfy the other condition of general State practice.

The right to life, however, is not absolute and permits certain carefully controlled exceptions as a civil right. Under ICCPR Article 6(1), the death penalty, with strict restrictions, is an exception of the right to life and the arbitrary deprivation of this right shall be prohibited. The GA’s resolution 2393 (XXIII) of 26th November 1968 requested States to ‘ensure the most careful legal procedures and the greatest possible safeguards for the accused in capital cases’. Its resolution 35/172 of 15th December 1980 urged to respect as a minimum standard the content of the provisions in ICCPR Articles 6, 14 and 15. This appears to limit the dimensions of this right, but not to influence its non-derogable and customary natures. Hence, this right is no doubt in the status of a customary law.

Furthermore, the prohibition against the arbitrary deprivation of life is part of both customary international law and *jus cogens*, considering its relationship with the protection of the right to life. As ICCPR Article 6 indicated, ‘arbitrarily’ means either ‘illegally’ or ‘unjustly’⁵¹⁰. The arbitrary deprivation of life is illegal or unjust,

⁵⁰⁶ GC3; GC4; PA1; PA2

⁵⁰⁷ RSICC, A/CONF.183/9

⁵⁰⁸ ECHR; ECHR-PN6; ECHR-PN13; CFREU; EUMSP; ADRDM; ACHR; ACHR-P-DP; ACHPR; ACRWC; ACharter

⁵⁰⁹ ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar’, UN Doc.

E/CN.4/1998/70[II/C.4./1]

⁵¹⁰ Nowak/1993/110-111

in breach of relevant norms on the protection of the right to life, and only legal and just deprivation is permitted. In essence, such prohibition is to urge States to correct such illegal or unjust actions and to ensure the right to life. Thus, the right to life is the objective of the prohibition against arbitrary deprivation of life and the latter is an essential method to effectively safeguard the former. Both of them are among customary international law.

2.9.1.2 The ‘most serious crimes’ clause

The applicable scope of capital punishment is limited to ‘the most serious crimes’ by conventional international law. This range appears not to be customary under international law.

It has been generally accepted that the death penalty should be used to punish eligible offenders who committed the most severe criminal offences rather than petty ones. The ICCPR has been ratified by many retentionist States, with Article 6(2) to expressly state the applicable extent of the death penalty. As a resolution endorsed by the GA, the Safeguards appears to ‘provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*’,⁵¹¹ on the applicable scope. Apart from ACHR Article 4(2), the RUSEM-DP also includes this provision, which should be read as implying that the death penalty is the last resort, considering the requirement to ‘reflect on the possibility of abolishing the death penalty’.⁵¹²

There are diverse interpretations of the concept of ‘most serious crimes’ from one country to another, despite the fact that it should be treated restrictively to consider the death penalty as a ‘quite exceptional measure’.⁵¹³ As the periodic reports to the HRCOM indicated, many States considered this term to include economic crimes, drug-related offences, political, property and even ordinary crimes.⁵¹⁴ A Special Rapporteur proposed eliminating economic crimes and drug-related offences⁵¹⁵, while the Safeguards stated that the applicable scope ‘should not go beyond intentional crimes, with lethal or other extremely grave

⁵¹¹ ICJ Reports/1996/I/254-255/[70]

⁵¹² ‘RUSEM-DP’, AHRComm/RES/42(XXVI)/99

⁵¹³ GC/6(6)/[7]

⁵¹⁴ Schabas/2002/106-107

⁵¹⁵ ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’, UN Doc.E/CN.4/1998/68[94]

consequences'.⁵¹⁶ There is also other support from international norms to promote progressive decrease in capital offences.⁵¹⁷

Without a very clear and uniform definition, there seems no domestic law against the 'most serious crimes' clause. But it appears to be very difficult to obtain sufficient evidence on this applicable scope in respects of State practice and *opinio juris*. Hence, the clause tends not to be customary international law.

2.9.1.3 Political offences

Political offences were prohibited from the imposition of the death penalty in America, in accordance with ACHR Article 4(4). This norm might not be a customary international law.

Only Latin American countries have the established tradition of excluding the imposition of the death penalty for political offences. This is 'associated with the concept of political asylum which found fertile soil' in these countries.⁵¹⁸ Within Latin America, all parties to the ACHR are bound by Article 4(4), despite Guatemala reserving it and subsequently withdrawing this reservation. The UN Sub-Com2 also called for its abolition for such offences at the universal level, while this has not been recognised in any international treaties. More important is, some political offences covered by the ACHR are likely not to fall within the category of the 'most serious crimes' in ICCPR Article 6(2).⁵¹⁹ This seems to leave no room for the general acceptance of this norm among States.

Furthermore, over 20 countries have extended the death penalty to political offences against the State and public order.⁵²⁰ Such State practice appears to run counter to the norm. Hence, these fail to meet the requirements of customary international law.

2.9.1.4 Offences committed by persons under military occupation

⁵¹⁶ 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc.E/Res/1984/50(25/05/1984)[1]

⁵¹⁷ 'Capital Punishment', UN Doc.A/RES/32/61

⁵¹⁸ Rodley/1999/222

⁵¹⁹ Schabas/2002/105-108

⁵²⁰ Hood/2002/78-79

According to GC4 Article 68(2), the imposition of capital punishment on protected persons is only limited to espionage, ‘serious acts of sabotage against the military installations of the Occupying Power’ or ‘intentional offences which have caused the death of one or more persons’. This seems to be part of customary international law because the GC4 has been ratified by virtually all States in the world and only a few States⁵²¹ reserved Article 68(2).

Nonetheless, this appears not to indicate that States generally accepted the death penalty provision. Even if over half of all countries in the world have abolished the death penalty in wartime, the State practice is inconsistent with the provision in Article 68(2).

2.9.1.5 Non-reintroduction

Non-reintroduction is another principle to restrict the use of the death penalty. It requires abolitionist countries not to reintroduce capital punishment and further that the principle on which this would be based would require even retentionist countries not to increase its original scope.⁵²²

The principle of non-reintroduction was explicitly recognised in major international human rights standards, e.g., ICCPR Article 6(2), ACHR Article 6(2) and Safeguards No. 1. This appears to have been universally accepted by States as a necessary approach to the abolition of capital punishment.

In practice, the death penalty is seldom reintroduced after being abolished. There have been four abolitionist countries to reinstate it since 1985.⁵²³ Specifically, Nepal reintroduced capital punishment since abolition; ‘the Philippines, resumed executions, but later stopped’; there have been no executions in Gambia and Papua New Guinea.⁵²⁴ Considering such violations, the worldwide practice of States fails completely to be consistent with this principle. More significantly, these countries in breach of non-reintroduction appear not to be persistent objectors. Hence, the non-reintroduction principle is among customary international law.

⁵²¹ Argentina, Pakistan, Republic of Korea, Suriname, USA

⁵²² Schabas/2002/24

⁵²³ AI 1

⁵²⁴ Ibid.

2.9.1.6 Non-retroactivity

The prohibition against the retroactive application of the death penalty has been recognised in major international treaties. ICCPR Articles 6(2), 15(1), ECHR Article 7, ACHR Article 9 and ACHPR Article 7(2) enshrined the principle. This is not derogable, even in time of emergency, which is stipulated in ICCPR Article 4(2), ECHR Article 15(2), and ACHR Article 27(2). The principle appears to be one of ‘judicial guarantees which are recognized as indispensable by civilized people’ in common Article 3 of the GC3 and GC4.

Both Safeguards No.2 and European Union Minimum Standards Paper (ii) add such a condition that ‘it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby’. This appears to indicate the non-retroactivity nature of the death penalty.

In practice, not all countries observe the non-retroactivity principle in the enforcement of capital punishment.⁵²⁵ The examples of its violations are not many, which occurred in Israel, Sudan, Nigeria, Iraq, Algeria, Maldives, ‘Burundi, Chad, Chile, Guinea, Guyana, Lebanon, and South Korea’, in addition to four States in USA.⁵²⁶ These breaches appear not to influence the customary-related feature of non-retroactivity.

2.9.2 Procedural Restrictions on Its Imposition

Some procedural safeguards on the imposition of the death penalty were considered as customary norms because of both the general practice and universal acceptance by States.⁵²⁷ The universal acceptance has been confirmed in common Article 3 to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field⁵²⁸, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea⁵²⁹, GC3 and GC4, which proscribes the executions ‘without previous judgment

⁵²⁵ Hood/2002/78

⁵²⁶ Ibid./77-78

⁵²⁷ Meron/1989/3-4

⁵²⁸ 75/UNTS/31

⁵²⁹ 75/UNTS/85

pronounced by a regularly constituted court, affording all the judicial guarantees'. Relevant procedural restrictions among 'judicial guarantees' will be examined as follows.

2.9.2.1 The right to a fair trial

Primary international human rights instruments contained the right to a fair trial without a definition. This might be customarily subsumed in 'judicial guarantees'.

There are a series of human rights standards on the right to a fair trial in capital cases. ICCPR Articles 6(2), 14(1), ECHR Articles 2(1), 6, and ACHR Articles 4(2), 8, required State parties to observe related standards. Primary resolutions of the UN bodies also deal with a fair trial as soft laws to urge all States to respect this right. Safeguards No.5 stated that the death penalty 'may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial'. With a similar formulation, the Safeguards 1996 specified that 'each defendant facing a possible death sentence is given all guarantees to ensure a fair trial'.⁵³⁰ With the Safeguards endorsed by the GA as its resolution, it appears to have been universally accepted by all State members of the UN, virtually all States in the world. Moreover, the fair trial of ICCPR Article 14 is incorporated into Article 6. This makes this right non-derogable in death penalty cases, as Article 6 cannot be suspended even in an emergency.⁵³¹

The right to a fair trial entails many requirements in the proceedings of all capital cases. Most of them are traditional systems that have been enshrined in major human rights instruments. Firstly, the accused facing the death penalty should be presumed innocent. This can be found in ICCPR Article 14(2), ECHR Article 6(2), ACHR Article 8(2), ACHPR Article 7(1)(b) and Safeguards No.4. The No.4 added such necessary evidence that the guilt punishable by death must be 'based upon clear and convincing evidence leaving no room for an alternative explanation of the facts' in imposition of the death penalty.⁵³²

⁵³⁰ 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc.E/RES/1996/15(23/07/1996)[3]

⁵³¹ GC/6(6)[1]

⁵³² 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc.E/Res/1984/50(25/05/1984)[4]

Secondly, such accused persons shall be entitled to legal representation. The treaties with relevant provisions are ICCPR Article 14(3)(d), ECHR Article 6(2)(c) and ACHR Article 8(2)(d). Moreover, Safeguards No.5 requires States to safeguard 'the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings' to ensure a fair trial.⁵³³ Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty Article 1(a) recommends member States supply 'the adequate assistance of counsel at every stage of the proceedings' of capital cases, 'above and beyond the protection afforded in non-capital cases'.⁵³⁴

Thirdly, they shall have adequate time to prepare a defence. Relevant treaties are ICCPR Article 14(3)(b), ECHR Article 6(2)(b), ACHR Article 8(2)(c) and ACHPR Article 7(1)(c). Safeguards No.5 simply states the need to 'ensure a fair trial, at least equal to those contained in Article 14' of the ICCPR. Accordingly, this right enshrined in ICCPR Article 14(3)(b) equally applies to Safeguards No.5. Both the Safeguards 1996 and Implementation shares the same approach with relevant treaties to stipulate allowing for 'time and facilities for the preparation' of the defence of those facing the death penalty.⁵³⁵

Fourthly, capital trials shall be held without undue delay. Such provisions are contained in ICCPR Article 14(3)(c), ECHR Article 6(1), ACHR Article 8(1), ACHPR Article 7(1)(d) and Safeguards No.5. Since Safeguards No.5 refers to ICCPR Article 14 to supply legal process with 'all possible safeguards to ensure a fair trial', it implies the same right included in ICCPR Article 14(3)(c).

Fifthly, the tribunal shall be impartial in all capital trials. This requirement is included in ICCPR Article 14(1), ECHR Article 6(1), ACHR Article 8(1), ACHPR Article 7(1)(b) and Safeguards No.5. With reference to ICCPR Article 14(1), Safeguards No.5 has the same minimum guarantees of a fair trial.

In practice, all States tend to deny and condemn violations of the right to a fair trial and many retentionist States have taken systematic measures to safeguard this

⁵³³ Ibid./[5]

⁵³⁴ 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty', UN Doc. E/RES/1989/64(24/05/1989)[1(a)]

⁵³⁵ 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc.E/Res/1984/50(25/05/1984)[5]; 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty', UN Doc.E/RES/1989/64(24/05/1989)[1(a)]

right in their criminal justice systems. However, ‘observing this safeguard in any country with the death penalty is an aspiration, rather than a statement of what is, in reality, achieved in all cases.’⁵³⁶ In some countries, miscarriages of justice in capital cases have taken place without the procedural guarantees of a fair trial, though some of wrongful cases were corrected. There were reports from the US, Belize, China, Japan, Malawi, Malaysia, Pakistan, Papua New Guinea, the Philippines, Trinidad and Tobago, Turkey, and Zambia, of persons facing the death penalty on the ground of their innocence.⁵³⁷ Nor did Algeria, the Democratic Republic of Congo, Egypt, Iraq, Kuwait, Nigeria, Pakistan, Sierra Leone, Chechnya, Afghanistan, Nigeria, Somalia, Saudi Arabia, China, the Palestinian Authority, Rwanda, Yemen, Iran, Ethiopia, Kenya, Bangladesh, India, Indonesia, South Korea, Guatemala, Sri Lanka, Japan, Lebanon, Togo, Zambia, and the US, meet the minimum standards of fair trial.⁵³⁸ This might lead to summary conviction of those facing the death penalty, as the HRCCom insisted in *Little v. Jamaica*⁵³⁹. Hence, while the practice of some States is in breach of the rule on the right to a fair trial, this right appears to be customary.

2.9.2.2 Appeal

The right to appeal has been adopted by major human rights instruments, e.g., ICCPR Article 14(5), Safeguard No.6, GC3 Article 106, GC4 Article 73, the ECOSOC’s resolutions⁵⁴⁰ and the HRCCom’s statements⁵⁴¹. Most retentionist States have accepted this right and many of them responded to UN surveys to provide this right and not to allow capital punishment ‘to be carried out while an appeal was pending’.⁵⁴²

However, the judicial practice of some States is not necessarily consistent with the rule on the right to an appeal. In China, Iran, Iraq, Syria, Malaysia, Libya, Jordan, Nigeria, Egypt, Armenia, Barbados, Belarus, Burundi, Guinea, Japan,

⁵³⁶ Hood/2002/132

⁵³⁷ Ibid./132-138

⁵³⁸ Ibid./138-156

⁵³⁹ CCPR/C/43/D/283/1988[8.6]

⁵⁴⁰ ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, UN Doc.E/Res/1984/50(25/05/1984)[6]; ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, UN Doc.E/RES/1996/15(23/07/1996)[6]

⁵⁴¹ GC/6(6)/[7]

⁵⁴² Hood/2002/157

morocco, Singapore, Sri Lanka, Tonga, Trinidad and Tobago, Zambia, and the US, the legal or judicial practice does not follow the rule and thus the right of those facing the death penalty appears not to be effectively guaranteed in practice.⁵⁴³ Yet such breaches appear not to weaken the customary-related feature of the rule on the right to an appeal.

2.9.2.3 Pardon, clemency, reprieve or commutation

The right to seek pardon, clemency, reprieve or commutation was regarded to have been widely admitted without much of a real problem for States.⁵⁴⁴ This seems to leave much room for further examination from two respects.

Major human rights instruments have enshrined the provisions on pardon, clemency, reprieve, or commutation. Specifically, ICCPR Article 6, ACHR Article 4(6) and GC4 Article 75 clearly stated the non-derogable right to seek pardon, clemency, reprieve or commutation in all cases. Together with these, amnesty also shall be granted in any capital cases. Without amnesty or reprieve, both GC6(6) and Safeguards No.7 is limited to explicit provisions on ‘the right to seek pardon or commutation of the sentence’,⁵⁴⁵ while Implementation 1(b) includes ‘clemency or pardon in all cases of capital offence’.⁵⁴⁶

Most States provide for certain means of legal remedy to request a re-examination of death sentences and commutation of death sentences may contribute to reduction of execution numbers. Accordingly, the norm on pardon, clemency, reprieve or commutation is likely to be a tendency to abolition of capital punishment, but not necessarily be customary international law.

Furthermore, GC3 Articles 101, 106 and GC4 Articles 73, 75 provided for the minimum time limit before execution of death sentences. Both of them have actually been accepted by all States that retain the death penalty. The non-execution pending appeal and clemency procedure on the above rights were also recognised in ACHR Article 4(6) and the GA’s resolution 2393 (XXIII) in 1968.

⁵⁴³ Ibid./157-163

⁵⁴⁴ Shcabas/2002/371

⁵⁴⁵ ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, UN Doc.E/Res/1984/50(25/05/1984)[7]; ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, UN Doc.E/RES/1996/15(23/07/1996)[6]

⁵⁴⁶ ‘Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty’, UN Doc.E/RES/1989/64(24/05/1989)

Moreover, the ECOSOC's resolutions have similar formulation with them. Safeguards No.8 stated that the death penalty 'shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence' without qualifying specific periods.⁵⁴⁷ The Safeguards 1996 recognised the States' obligation 'to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency'.⁵⁴⁸ The Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur further urged States to enact their national laws within a reasonable 'period of at least six months' to prepare 'appeals to courts of higher jurisdiction and petition for clemency' before execution.⁵⁴⁹ Additionally, the ESAE-SR added that officials related to death executions should be informed of the condition on appeals or petitions for clemency.⁵⁵⁰

Nonetheless, the above instruments appear to only indicate the universal acceptance of States on the rule of pardon, clemency, reprieve or commutation. This is just one requirement of customary rules and would not be necessarily followed by the consistency of State practice with the rule.

Although 'in most retentionist countries clemency can be sought both while the various appeal and confirmation procedures are pending and after final judgment is announced', the safeguard guaranteeing time to present an appeal for clemency might be given cursory consideration.⁵⁵¹ Clemency is exceptionally rare in the US and commutation of sentence only applied to one case in Japan.⁵⁵² Pardons are rarely granted in Bahrain, Indonesia, Singapore, and never happened in Japan.⁵⁵³ Hence, the State practice does not always conform to the rule, but this rule still would be customary.

2.9.2.4 Humane treatment

⁵⁴⁷ 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc.E/Res/1984/50(25/05/1984)[8]

⁵⁴⁸ 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN Doc.E/RES/1996/15(23/07/1996)[5]

⁵⁴⁹ 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', UN Doc.E/CN.4/1998/68 [118]

⁵⁵⁰ Ibid.

⁵⁵¹ Hood/2002/164

⁵⁵² Ibid./165

⁵⁵³ Ibid.

The prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment has been recognised in major international human rights norms. Among them, the CRC, enshrining it in Article 37(a), has been ratified by 191 States or virtually all States that have not abolished the death penalty. The common Article 3 of the GC3 and GC4, ratified by all retentionist States, also implicitly required the humane treatment as ‘judicial guarantees’. Apart from the above, the HRCCom and the ECOSOC respectively confirmed ‘the least possible physical and mental suffering’⁵⁵⁴ or ‘the minimum possible suffering’⁵⁵⁵ in the execution of the death penalty. Moreover, the ECOSOC urged retentionist States to effectively apply the SMRTP ‘in order to keep to a minimum the suffering’ of such prisoners.⁵⁵⁶ Safeguards No.9 requires the death penalty to ‘be carried out so as to inflict the minimum possible suffering’. This appears to imply protecting the right to humane treatment and preventing torture, cruel, inhuman or degrading treatment or punishment, without explicit provisions about them. These documents of the UN bodies have been adopted with the general acceptance of all State members. This appears to indicate that this principle has been generally accepted as law by States.

In practice, the violations of this principle were frequently reported and this phenomenon is not rare in capital cases, even if some States have taken measures to improve conditions in death row and reduce unnecessary sufferings. The minimum standards were laid down to supply death row inmates with enough out-of-cell time, recreational facilities, and opportunities to work, dine, or attend religious services.⁵⁵⁷ Yet such violations as poor conditions in death row⁵⁵⁸, a long delay between sentence and execution⁵⁵⁹ and a cruel execution method⁵⁶⁰ have actually happened in reality. Executions have been carried out by such methods as beheading, electrocution, hanging, lethal injection, shooting and stoning since 2000.⁵⁶¹ Among them, both lethal injection and shooting are available in China.⁵⁶²

⁵⁵⁴ GC/20(7)/[6]

⁵⁵⁵ Safeguards No.9

⁵⁵⁶ ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, UN Doc.E/RES/1996/15(23/07/1996)[7]

⁵⁵⁷ Schabas/2002/139

⁵⁵⁸ Kelly v. Jamaica(CCPR/C/41/D/253/1987)[3.8]

⁵⁵⁹ Johnson v. Jamaica(CCPR/C/56/D/588/1994)[8.8].

⁵⁶⁰ Ng v. Canada(CCPR/C/49/D/469/1991)[16.4]

⁵⁶¹ AT 1

⁵⁶² Chen Lie & Zhang Leping, in *QB*(11/07/1997); *JCRB* 5

None of these methods are free from criticism, despite lethal injections being generally considered as the most humane. Hence, the principle on humane treatment appears to be customary-related, even if there are relevant human rights violations in State practice.

2.9.3 The Exemptions of Certain Categories of Persons

2.9.3.1 Persons below 18 years old

It is generally accepted that capital punishment shall not be imposed on children, without the precise specification of a cut-off age. The concept of children was indirectly defined as ‘persons below 18 years of age’ in major international human rights treaties.⁵⁶³ It is essential to address whether the prohibition against execution of children or that of ‘persons below 18 years of age’ is part of customary international law.

The prohibition against the application of capital punishment to persons under 18 years is universally recognised in major human rights or humanitarian instruments. Among them, the CRC has been ratified by almost all States without reservation, except for the USA and Somalia, while the Safeguards, as a resolution of the UN, reaffirmed the rule in No. 3. The GC3 and GC4 also enshrined it and have been ratified virtually by all States. This appears to show a general acceptance of excluding children below 18 years of age from being executed by States.

In practice, all States consistently prohibit the execution of children, but not all are against the imposition of the death penalty on those below 18 years of age. Most States exclude such children from its imposition and execution in domestic laws as parties to the ICCPR, CRC, or ACHR without a reservation on this issue. Different from them, the relevant law of the USA varies from one State to another,⁵⁶⁴ and some other countries also have such violations.⁵⁶⁵ However, this cannot deny the position of the rule in customary international law. The US is not a consistent objector because it made no objection to relevant standards in GC4

⁵⁶³ CRC Article 37(a)

⁵⁶⁴ Hood/2002/116

⁵⁶⁵ Ibid./119

Article 68(4) or ICCPR Article 6 during the drafting of them.⁵⁶⁶ Its reservation on ICCPR Article 6(5) appears to be incompatible with the object and purpose of the instrument and thus ineffective. In sum, the norm of prohibiting the imposition of persons under 18 years old is a rule of customary international law.

2.9.3.2 Pregnant women and mothers of young children

There are two primary questions to be addressed on this issue. Is the prohibition against the carrying out of the death penalty on pregnant women or mothers of young children within customary international law? Is it likely for this rule to expand its scope to all women?

The prohibition against the execution of pregnant women or mothers of young children (new mothers) is 'recognized in all the international norms'⁵⁶⁷. They are mainly ICCPR Article 6(5), ACHR Article 4(5), PA1 Article 76(3), PA2 Article 6(4) and Safeguards No.3. This appears to show a general acceptance of those facing the death penalty. In the past several years there was no report on the execution of pregnant women, whereas new mothers were executed in some countries.⁵⁶⁸ Hence, the exclusion of both pregnant women from the execution is customary international law and new mothers not.

Nonetheless, there is no provision to prohibit the carrying out of the death penalty on all women and only a few countries exempted it from execution.⁵⁶⁹ But in theory, the prohibition seems to be a kind of discrimination against the principle of non-discrimination on the basis of gender. The exclusion of the whole group of women means the different status or inequality between women and men before law and actually amounts to discrimination on the basis of different genders. This is against the principle of the non-discrimination as a customary international law. While the discrimination on the basis of gender is not necessarily unlawful, the exclusion of all women from being executed appears not to be customary-related.

2.9.3.3 The elderly over 70 years old

⁵⁶⁶ Schabas/2002/375

⁵⁶⁷ Ibid./373

⁵⁶⁸ Hood/2002/120

⁵⁶⁹ Ibid.

The ACHR is the only international norm to specify an upper age limit of 70 years old on those facing the death penalty. The Safeguards failed to address this issue, whereas four years later the ECOSOC's Implementation Article 1(c) recommended that member States establish 'a maximum age beyond which a person may not be sentenced to death or executed'⁵⁷⁰. This seems close to ACHR Article 4(5), but lacks explicit provisions on prohibition of execution of the elderly beyond 'a maximum age'.

But in practice only a few States have exempted the execution of the elderly.⁵⁷¹ Since it is hard to find the requisite elements of custom in this respect, it tends not to have customary nature.

2.9.3.4 The insane

Under many legal systems, insanity is a factor which influences criminal responsibilities of offenders and the insane cannot stand trial. The 'ability to appreciate the nature and consequences of punishment would appear to be the test of insanity' in death penalty cases.⁵⁷² It is desirable to examine whether the prohibition against the execution of the insane has the customary feature under international law.

State practice is consistent with the prohibition against the execution of the insane because no reports filed in the UN indicated the execution of the insane by States.⁵⁷³ As Justice Marshall observed in *Ford. v. Wainwright*, 'no jurisdiction has countenanced the execution of the insane' for centuries⁵⁷⁴. This appears not to show empirical evidence that any State actually executes the insane or no legislative provisions to this effect.⁵⁷⁵ As criminologist Roger Hood reported, however, 'there is no reliable information on whether persons have been executed in any country while insane'⁵⁷⁶.

⁵⁷⁰ 'Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty', UN Doc. E/RES/1989/64(24/05/1989)

⁵⁷¹ Schabas/2002/119

⁵⁷² Schabas, in *CLF*/1993/96

⁵⁷³ *Ibid.*/112

⁵⁷⁴ U.S./1986/477/399/401; Entin, in *JCLC*/1998-1999/218-239

⁵⁷⁵ Schabas, in *CLF*/1993/112-113

⁵⁷⁶ Hood/1989/65

Furthermore, various resolutions of the UN organs involving the prohibition of the execution of the insane are the evidence of *opinio juris*. The Safeguards first added the insane to those who cannot be executed under the death penalty. Its No.3 expressly excluded ‘persons who have become insane’ from being executed. This provision appears to be useful and reasonable because some ‘individuals who are fit to stand trial and are properly convicted’ may ‘become insane before sentence is carried out’.⁵⁷⁷ It can be inferred that this wide support might ‘indicate the *opinio juris* of virtually all UN member states’.⁵⁷⁸ Thus, the prohibition against such execution is among customary norms.

Different from that of the insane⁵⁷⁹, the related issue on the execution of the persons with any forms of mental retardation is not customary international law. The ECOSOC proposed non-execution of ‘persons suffering from mental retardation or extremely limited mental competence’.⁵⁸⁰ But only some countries consider mental retardation as one of the defenses to criminal responsibility that can lead to acquittal. There appears not to be sufficient evidence to indicate State practice or *opinio juris*.

2.10 Summary

In brief, international human rights law deals, *inter alia*, with capital punishment and protects the rights of those facing the death penalty. The treaties concerning capital punishment impose obligations on China as a party.

China has ratified the CAT and CRC; acceded to the CERD; ratified the GC3, GC4, PA1 and PA2; and had signed the ICCPR without ratification. Accordingly, China should undertake various treaty obligations on the death penalty in the former seven treaties as a party and will have more related obligations after ratifying the ICCPR. These treaty obligations oblige China not to engage in any forms of the relevant human rights violations in breach of the above treaty standards.

⁵⁷⁷ Schabas/2002/375

⁵⁷⁸ Schabas, in *CLF*/1993/113

⁵⁷⁹ Ellis & Luckasson, in *GWLR*/1984-1985/414-493

⁵⁸⁰ ‘Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty’, UN Doc.E/RES/1989/64[I(d)]

Specifically, the CAT entails for China the obligation to prohibit torture, cruel, inhuman or degrading treatment or punishment without any exceptions or derogations, and not to extradite capital offenders. The CRC legally obliges non-discrimination, exclusion of imposing the death penalty on persons below eighteen years of age, and respect for the responsibilities, rights and duties of the child. The CERD requires China to eliminate racial discrimination and to guarantee persons facing the death penalty the enjoyment of equal treatment before the courts and tribunals. Under the GC3, GC4, PA1 and PA2, China has to undertake a series of duties to protect prisoners of war or civilian persons in time of war from having the death penalty arbitrarily imposed.

Universally applicable to war or peace time, the ICCPR details the limitations on the legislation, imposition and execution of the death penalty. After the ratification of the ICCPR, China has to undertake all of the relevant treaty obligations, except for effective reservations. Before that, only customary norms contained in the ICCPR create legally binding obligations on China as a non-persistent-objector. These are the protection of the right to life against its arbitrary deprivation; the exclusion of persons below 18 years old from capital punishment; and the exemption of pregnant women and the insane from executions.

Therefore, China should undertake and abide by the above-mentioned treaty obligations, which it has already accepted, in order that there will be no further violations in whatever form and ramifications. China has to also assume the obligation not to embark on patterns of gross and flagrant violations of human rights in capital punishment cases pursuant to customary international law, including parts of the ICCPR which it has not yet ratified.

Chapter III THE DEATH PENALTY: CHINA'S PRACTICE AND POLICY

3.1 General

In contrast to the abolitionist States in the world⁵⁸¹, China maintains capital punishment with certain restrictions on its use. The present death penalty policy is 'to kill less' and cautiously⁵⁸², 'those who do not have to be killed should not be sentenced to death'⁵⁸³, which reflects the criminal policy of 'punishment combined with leniency'⁵⁸⁴. This Chinese policy seems to essentially adopt strict limits on the use of the death penalty.⁵⁸⁵

However, external bodies have strongly criticised that: '[T]here is a huge gap between policy and practice with regard to the death penalty in China,'⁵⁸⁶ which is demonstrated in the following examples. Firstly, Chinese criminal systems appear not to guarantee a fair trial or due process,⁵⁸⁷ in law or practice. This may lead to arbitrary or unlawful deprivation of life in death penalty cases.⁵⁸⁸ In addition to the widespread practice of torture and 'harsh and frequently degrading' conditions in penal institutions,⁵⁸⁹ reportedly, there are other failings that jeopardise the lives of people suspected of committing capital crimes⁵⁹⁰. There is no presumption of innocence, and there is 'political pressure to pass heavy sentences'⁵⁹¹. There is no requirement for lawyers to be present at the initial police interrogation.⁵⁹² Furthermore, there is a severe lack of the legal safeguards, meaningful appeals and final approval of death sentences⁵⁹³.

Secondly, with the confidential statistics 'on death sentences and executions',⁵⁹⁴ China still continues to 'extensively and arbitrarily'⁵⁹⁵ 'execute more people than the rest of the world combined'⁵⁹⁶, largely as a result of political

⁵⁸¹ AI 1

⁵⁸² Mao Zedong/1991/1271

⁵⁸³ Ibid/40

⁵⁸⁴ Zhao Bingzhi, in Zhao Bingzhi/2004/18

⁵⁸⁵ Ibid.

⁵⁸⁶ AI 6

⁵⁸⁷ AI 7; BDHRL 1-7.

⁵⁸⁸ AI 8

⁵⁸⁹ AI 9-13; BDHRL 6-7

⁵⁹⁰ AI 7, 14-15

⁵⁹¹ Ibid.

⁵⁹² Ibid.

⁵⁹³ AI 10-12; BDHRL 7

⁵⁹⁴ AI 16

⁵⁹⁵ AI 17

⁵⁹⁶ AI 18-19

interference.⁵⁹⁷ During the campaign of ‘Strike Hard’, ‘use of the death penalty’ was markedly on the increase, and ‘numerous people’ were ‘convicted through expedience’ rather than rigour on the part of the courts.⁵⁹⁸ The scope of ‘mass summary executions’⁵⁹⁹ also extended to ‘child offenders’,⁶⁰⁰ pregnant women,⁶⁰¹ the disabled, foreign nationals and residents of ‘Hong Kong and Macao’ and ‘extradition issues’.⁶⁰²

Thirdly, execution of death sentences, after nominal review and ‘confirmation of sentences’ by higher courts,⁶⁰³ often fell ‘far short of international fair trial standards’.⁶⁰⁴ Public rallies⁶⁰⁵ and the parading of prisoners⁶⁰⁶ sentenced to death ‘on the day of conviction or on the denial of an appeal’⁶⁰⁷ are deemed as a strategy ‘to celebrate national events’⁶⁰⁸. With the introduction of lethal injections, there is a fear that its use may facilitate ‘organ transplants’, a practice which has been well-documented in China.⁶⁰⁹ Executed prisoners were among the sources of such organs⁶¹⁰, thus inevitably raising the question ‘whether meaningful or voluntary consent from the prisoners or their relatives was obtained’.⁶¹¹

In stark contrast to these objections, Chinese official arguments appear to be more general and political than pertinent, and thus it is difficult to find a series of diametrically opposed disputes in the WPs of the Chinese Government. The 1991 ‘Human Rights in China’ is the only to address the death penalty among all WPs released by the IOPRC. It details ‘very stringent’ restrictions⁶¹² of the death penalty including its applicable scope, exclusive categories, procedures for review and ‘a two-year reprieve’ of death sentences. Moreover, the Government avoided direct comments on so-called State secrets and kept silent on organ harvesting in WPs. Yet it was officially reported that the Chinese Government strictly prohibited sale

⁵⁹⁷ AI 17, 20

⁵⁹⁸ AI 21

⁵⁹⁹ AI 18, 22

⁶⁰⁰ AI 10-11, 16

⁶⁰¹ AI 23

⁶⁰² AI 10, 24

⁶⁰³ BDHRL 1

⁶⁰⁴ AI 25

⁶⁰⁵ AI 26

⁶⁰⁶ Ibid.

⁶⁰⁷ BDHRL 6

⁶⁰⁸ AI 10-11

⁶⁰⁹ AI 8, 10-11

⁶¹⁰ AI 27

⁶¹¹ BDHRL 7

⁶¹² HRC1991/[IV]

and purchase of human organs and tissues, despite there being no national laws to control organ donations.⁶¹³ Additionally, EU-China Dialogue Seminars on Human Rights has heated debates about death penalty issues. This appears to mainly involve relevant law reforms using the textbooks only, instead of the reality. Hence, in general, these rebuttals seem to be too weak or unconvincing to explain ‘the question of why these rights are violated’ and ‘why such violations are allowed to continue’.⁶¹⁴

Generally speaking, the death penalty policy is the significant guideline for the establishment and application of the death penalty in China.⁶¹⁵ Owing to the direct effect of this policy on Chinese legal and judicial practices in general, it is reasonable to explore related legislation and practice in China in an attempt to demonstrate and assess this policy. Both legal and judicial practices also tend to directly describe the situation whether or not China faithfully performs its international human rights obligations. This chapter will start from the legal status of the right to life in the 1982 Constitution, followed by the practice concerned. It attempts to examine and assess the Chinese policy towards the death penalty and the fulfilment of relevant international human rights obligations by China.

3.2 Legislation

3.2.1 The 1982 Constitution

China has the 1982 Constitution, supreme over all other laws. It provides for essential national systems, and the basic rights and obligations of citizens, which embodies primary policies and guidelines. In 2004, ‘human rights’ were newly enshrined in 1982 Constitution Article 33, without mentioning such basic rights as the right to life, the right to amnesty, and the right to defence. This is distinct from the 47 countries that have prohibited or restricted the death penalty in their Constitutions on diverse grounds.⁶¹⁶ This tends to highlight the lack of importance that China attaches to these rights.

Since the constitutional coverage of the right to life is rather limited, it is necessary to explore the death penalty policy by drawing on other relevant legal

⁶¹³ Hu Changlong/2003/177

⁶¹⁴ AI 5

⁶¹⁵ Zhao Bingzhi, in Zhao Bingzhi/2004/18

⁶¹⁶ AI 28

frameworks, inclusive of both the primary legislation by the legislature and judicial interpretation by the SPC. This will be examined respectively, firstly looking at the legislature, responsible for making legislation on the death penalty, and secondly the judicial organs that hear capital cases or interpret related laws and regulations.

3.2.1.1 Legislature

According to the 2001LL, the main legislative organs are the NPC and its Standing Committee⁶¹⁷, State Council⁶¹⁸, local governments⁶¹⁹ and people's congresses of provinces, autonomous regions, and municipalities directly under the Central Government⁶²⁰. Accordingly, the Chinese law can be divided into four primary levels, the Constitution, basic laws, administrative regulations and local regulations. Since capital cases involve 'crimes and criminal sanctions',⁶²¹ the concerned legislation of China can be found in the national laws enacted by the NPC and its Standing Committee⁶²² and the relevant legislative interpretation⁶²³.

3.2.1.2 Judicial organs

As stated by the Organic Law of the People's Court of the PRC, adopted in 1983, Chinese judicial organs are the PCs of China.⁶²⁴ This includes the SPC, HPCs, IPCs, Basic People's Courts, military courts and other specialised courts.

As 'the highest judicial organ' of the State,⁶²⁵ the SPC shall not only hear capital cases or review death sentences, but also promulgate judicial interpretations of universal effect as departmental rules for the unity of law enforcement.⁶²⁶ The BPCs, IPCs and HPCs may handle cases of first instance, whereas the IPCs and HPCs only address those transferred from lower PCs or those of appeals and of protests lodged against judgements and orders of the BPC.⁶²⁷

⁶¹⁷ 2000LL Articles 7-10, 47

⁶¹⁸ 2000LL Article 56

⁶¹⁹ 2000LL Article 73

⁶²⁰ 2000LL Article 63

⁶²¹ 2000LL Article 8

⁶²² 2000LL Article 7

⁶²³ It is interpreted by the NPC Standing Committee according to 2000LL Article 42.

⁶²⁴ 1983OL Article 1

⁶²⁵ 1983OL Article 30

⁶²⁶ *Legal Daily* 3

⁶²⁷ 1983OL Articles 21, 25

Among specialised PCs, military courts accept and hear criminal cases,⁶²⁸ and railway transport courts have jurisdiction both over criminal cases which occurred on railroad lines, and permanent workers and staff in railway administrative bureaus⁶²⁹. Both of them are different from maritime courts⁶³⁰ and forestry courts⁶³¹.

All the above-mentioned courts handling criminal cases may hear capital cases unless otherwise regulated. This means that the IPCs, HPCs, SPC, military courts and railway courts could accept or try capital offences.

Additionally, military courts have the jurisdiction over all capital cases involving the crimes contrary to duties by servicemen and other crimes committed by anyone who belongs to the armed forces. There are the division of first-instance courts, second-instance courts and those responsible for the review of death sentences, among such special courts. It does not follow that military courts may apply any substantive or procedural laws, in sentencing servicemen to death, which are different from those used in other capital cases accepted, heard, sentenced, examined, or reviewed by ordinary courts. The following 1997CL and 1996CPL are equally applicable to capital crimes committed by servicemen sentenced by military courts. Accordingly, military courts and relevant capital cases under their jurisdiction share the same characteristics with others relating to death sentences in both advantages and disadvantages as follows. This work deals primarily with non-military courts and cases.

3.2.2 Substantive Criminal Legislation on the Death Penalty

Under Chinese legal systems, the substantive criminal legislation is a basic branch of laws separate from the procedural one. The 1997CL⁶³² is the primary legal source of substantive laws on the death penalty, which specifies relevant crimes

⁶²⁸ Xinhuanet 17

⁶²⁹ Ibid.

⁶³⁰ Ibid.

⁶³¹ Ibid.

⁶³² The 1979CL was revised on 14th March 1997 that is called the 1997CL. Subsequently, Amendment I, Amendment II, Amendment III, Amendment IV, Amendment V and Amendment VI to the 1997CL were made and promulgated by the NPC Standing Committee, respectively on 25th December 1999, 31st August 2001, 29th December 2001, 28th December 2002, 28th February 2005 and 29th June 2006.

and punishments. This will be analysed in detail from the perspectives of ‘General Provisions’ and ‘Specific Provisions’⁶³³.

3.2.2.1 General provisions

3.2.2.1.1 *The applicable scope in principle*

In ‘General Provisions’, 1997CL Article 48 explicitly states the limits on the applicable scope of the death penalty in principle, namely in the context of ‘extremely serious crimes’. This generally refers to the crimes with extremely odious circumstances, seriously endangering the essential interests of the State, society and people, according to authoritative textbooks like the *Chinese Criminal Law*.⁶³⁴ Thus, only the criminals who have severely endangered the interests of citizens, society and the nation may be sentenced to death.

Literally, ‘extremely serious crimes’ in 1997CL Article 48 and ‘most serious crimes’ in ICCPR Article 6(2) have the same meaning and coverage. Accordingly, the general applicable scope of capital punishment in the Chinese legislation appears to conform to the relevant requirement of the ICCPR.

3.2.2.1.2 *The exclusive categories*

3.2.2.1.2.1 Young Persons and Pregnant Women

As 1997CL Article 49 indicated, persons who have not attained the age of 18 at the time the crime was committed or ‘women who are pregnant at the time of trial’ are two categories of persons excluded from the application of capital punishment. The exemption of the first group of persons means that ‘[S]entence of death shall not be imposed for crimes committed by persons below eighteen years of age’, which is just required by ICCPR Article 6(5).

Nonetheless, the second group of persons is ‘women who are pregnant’, only at the time of trial’ and not all stages of proceedings, by 1997CL Article 49. The ‘trial’, basically, refers to the periods of the hearing and sentence in court, precluding the stage of pretrial detention and subsequent phases before execution. The scope of ‘women who are pregnant at the time of trial’ also contains such pregnant women that were accused of capital offences in court after spontaneous

⁶³³ They are the two parts in the 1997CL.

⁶³⁴ Qu Xinqiu/2002/49

abortion during detention, as the Reply of the Supreme People's Court on Whether to Apply Capital Punishment to Pregnant Woman Normally Aborted during Detention in Trial⁶³⁵ interpreted. This does not appear to exempt all pregnant women from the application of capital punishment, including its imposition and execution. Hence, there is an obvious difference between the above Chinese legislation and ICCPR Article 6(5).

3.2.2.1.2.2 The Mental Patients

Another category of persons excluded from the application of capital punishment is mental patients, as per 1997CL Article 18. Specifically, they 'shall not bear criminal responsibility' for 'harmful consequences' while being 'unable to recognize or control' their own conducts, 'upon verification and confirmation through legal procedure'⁶³⁶. In other words, a mental patient shall bear criminal responsibility for his crimes committed when 'he has not completely lost the ability of recognizing or controlling his own conduct' or when 'in a normal mental state'⁶³⁷.

Accordingly, not all mental patients, but only those who cause 'harmful consequences' when being 'unable to recognize or control' their own conducts, namely, the insane, cannot bear criminal responsibility⁶³⁸. This leaves no room for the application of capital punishment to the insane, regardless of its imposition or execution. Clearly, it conforms to the exclusion of the insane from its execution under customary international law.

Therefore, 3 person specific exemptions exist; those which apply to persons under 18 years of age, pregnant women and those persons who are insane. These appear to be consistent with China's customary obligations, except for the provisions on pregnant women that create a clear conflict and scope for further debate.

3.2.2.1.3 *The death penalty with a suspension of execution*

⁶³⁵ China 2

⁶³⁶ 1997CL Article 18

⁶³⁷ Ibid.

⁶³⁸ Ibid.

As a specific means for enforcement of the death penalty, the death penalty with a suspension of execution might be considered as the system of conditionally commuting death sentences. The application of this system, by 1997CL Article 48, should meet two requirements: a crime is punishable by death; and ‘the immediate execution’ is deemed unnecessary.⁶³⁹ The first is the common precondition of, and the second is the division between, this system and the death penalty with immediate execution.

Furthermore, the death penalty with a suspension of execution shall be commuted to life imprisonment or fixed-term imprisonment of ‘not less than fifteen years but not more than twenty years upon the expiration of the two-year period’, pursuant to 1997CL Article 50. Without ‘intentionally’ committing ‘a crime during the period of suspension, for one thing, ‘the person sentenced to death with a suspension of execution’ ‘is to be given a reduction of sentence to life imprisonment’.⁶⁴⁰ Any unintentional crime committed ‘during the period of suspension’ would not influence the application of this commutation system.

For the other, the person that ‘demonstrates meritorious service’ ‘is to be given a reduction of sentence to ...fixed-term imprisonment’, which depends upon whether or not the individual has truly performed ‘meritorious service’. This is different from the 1979CL⁶⁴¹ that needs both the true repentance and performance of ‘meritorious service’ to qualify for the commutation to the fixed-term imprisonment. Without true repentance or intentional crimes, ‘the person sentenced to death with a suspension of execution’ may be commuted to fixed-term imprisonment, pursuant to 1997CL Article 50. The system appears to effectively commute death sentences and reduce the number of executions, which conforms to the principle of commutation provided in ICCPR Article 6(4). On the contrary, the death penalty with immediate execution is against the principle as a customary rule that requires commutation to apply to all capital cases.

⁶³⁹ It mainly involves criminals who voluntarily surrender themselves to justice or perform meritorious services, or commit crimes in a state of passion, out of righteous indignation or other criminal motives not exceptionally vicious. It also encompasses criminals who do not commit most serious crimes as one of the principal criminals in case of joint crimes, or who have an intelligent deficiency or other situations worthy of sympathy.

⁶⁴⁰ 1997CL Article 50

⁶⁴¹ It specifies that ‘[I]f the criminal has been truly repented and performed meritorious service’, ‘this system shall be commuted to fix-term imprisonment of not less than 15 years but not more than 20 years upon expiry of two-year suspension.’

However, ‘the death penalty is to be executed upon the approval’ of the SPC, ‘if there is verified evidence that he has intentionally committed a crime’.⁶⁴² It follows that the death penalty shall be immediately executed if the criminal commits any kinds of intentional crimes during the period of suspension. This appears to disregard any reasons or consequences of these crimes and the subjective intents and purposes of criminals in capital punishment cases. Differently, the 1979CL explicitly stipulated the comprehensive examination of both subjective and objective aspects in the imposition of capital punishment. Compared with the relevant provisions of the 1979CL, 1997CL Article 50 is likely to extend the applicable scope of capital punishment in practice.

3.2.2.1.4 Others

The 1997CL certainly specifies the principle of non-retroactivity in Article 12(1). If an act that was committed after the founding of China and ‘before the entry into force of this Law’, ‘was not deemed as a crime under the laws at the time, those laws shall apply’. Otherwise, the act ‘is subject to prosecution’ and ‘criminal responsibility shall be investigated in accordance with those laws’, unless being subject to a lighter punishment under this Law. In essence, this is the principle of observing old laws except where new ones specify lighter punishments, which equally applies to capital punishment cases. Hence, this tends to follow the principle of non-retroactivity specified in ICCPR Articles 6(2) and 15.

Additionally, the 1982Constitution merely confirms the amnesty as a State power, without further specification. Amnesty is also implied in the 1997CL⁶⁴³ and equally applicable to capital punishment cases. It is designed to reduce the number of death sentences and executions.

3.2.2.2 Specific Provisions

⁶⁴² 1997CL Article 50

⁶⁴³ 1997CL Articles 65 and 66

In ‘Specific Provisions’, nine out of ten chapters⁶⁴⁴ of the 1997CL have provisions relating to capital punishment, except for ‘Crimes of Dereliction of Duty’, with 68 capital charges in total. The number is respectively 7⁶⁴⁵ in Chapter One, 14 in Chapter Two⁶⁴⁶, 16 in Chapter Three⁶⁴⁷, 5 in Chapter Four⁶⁴⁸, 2 in Chapter Five⁶⁴⁹, 8 in Chapter Six,⁶⁵⁰ 2 in Chapter Seven,⁶⁵¹ 2 in Chapter Eight,⁶⁵² 12 in Chapter Ten.⁶⁵³ This broad applicable scope seems to go beyond ‘extremely’ or ‘most

⁶⁴⁴ This part encompasses ten chapters, namely ‘Crimes of Endangering the State Security’, ‘Crimes of Endangering Public Security’, ‘Crimes of Undermining the Socialist Economic Order’, ‘Crimes of Infringing upon the Rights of the Person and the Democratic Rights of Citizens’, ‘Crimes of Property Violation’, ‘Crimes of Obstructing the Administration of Public Order’, ‘Crimes of Endangering Interests of National Defence’, ‘Crimes of Embezzlement and Bribery’, and ‘Crimes of Dereliction of Duty’, and ‘Crimes Contrary to Duties Committed by Servicemen’. From the order of these chapters, it is obvious that China highlights protection of the interests of the State security, public security, and the socialist economic order, much more than guarantee of rights of the person and the democratic rights of citizens.

⁶⁴⁵ They are treason (Article 102), crime of splitting the country (Article 103(1)), crime of armed rebellion or armed riot (Article 104), crime of defecting to the enemy and turning traitor (Article 108, and 111), crime of espionage (Article 110), crime of stealing, secretly gathering, purchasing, or illegally providing State secrets or intelligence for an organisation, institution, or personnel outside the country (Article 111), and the crime of supporting enemy (Article 112).

⁶⁴⁶ They are arson (Article 115(1)), the crime of breaching a dike (Article 115(1)), crime of causing explosion (Article 115(1)), crime of spreading dangerous materials (Article 115(1)), crime of endangering the State security by dangerous means (Article 115(1)), crime of sabotaging any means of transport (Article 119(1)), crime of sabotaging transportation facility (Article 119(1)), crime of hijacking any aircraft (Article 121), crime of sabotaging electric power facility (Article 121), crime of sabotaging inflammable or explosive equipment (Article 121), crime of illegally manufacturing, trading, transporting, mailing or storing any guns, ammunition or explosives (Article 125(1)), crime of illegally manufacturing, trading, transporting, or storing dangerous materials (Article 125(2)), crime of stealing or forcibly seizing any guns, ammunition or explosives (Article 127(1)), and crime of robbing any guns, ammunition, explosives or dangerous materials (Article 127(2)).

⁶⁴⁷ The crime of producing or selling fake medicines (Article 141), crime of producing or selling foods mixed with poisonous or harmful non-food materials (Article 144), crime of smuggling arms, ammunitions (Article 151(1)), crime of smuggling nuclear materials (Article 151(1)), crime of smuggling counterfeit currency (Article 151(1)), crime of smuggling cultural relics (Article 151(2)), crime of smuggling precious metals (Article 151(2)), crime of smuggling precious and rare species of animals and the products thereof (Article 151(2)), crime of smuggling ordinary goods and articles (Article 153), crime of counterfeiting money (Article 170), crime of fraud by raising funds (Article 192), crime of financial bills fraud (Article 194(1)), crime of monetary documents fraud (Article 194(2)), crime of credit fraud (Article 195), crime of falsely issuing exclusive value-added tax invoices, defrauding export tax refunds or offsetting taxes invoices (Article 205), crime of forging or selling forged exclusive value-added tax invoices (Article 206).

⁶⁴⁸ They are the crime of intentional homicide (Article 232), crime of intentional injury (Article 234), crime of rape (Article 236(1), Article 241(2), and Article 259(2), and Article 300(3)), crime of kidnapping (Article 239), and crime of abducting and trafficking in a woman or child (Article 240 and Article 241(5)).

⁶⁴⁹ They are the crime of robbing (Article 263), and crime of theft (Article 264).

⁶⁵⁰ They are the crime of teaching crime-committing methods (Article 295), crime of instigating a riot to escape from prison (Article 317(2)), crime of gathering people to raid a prison with weapons (Article 317(2)), crime of robbing ancient cultural ruins and ancient tomb burial objects (Article 328(1)), crime of robbing ancient human fossils and ancient vertebrate fossils (Article 328(2)), crime of smuggling, trafficking, transporting and manufacturing drugs (Article 347), crime of arranging prostitution, and crime of forcing prostitution (Article 358).

⁶⁵¹ They are the crime of sabotaging weapons and equipment, military facilities or military communications (Article 369), and crime of intentionally supplying unqualified weapons and equipment and other military facilities (Article 370(1)).

⁶⁵² They are the crime of graft (Article 382) and crime of bribery (Article 385).

⁶⁵³ They are the crime of defying of orders in wartime (Article 421), crime of concealing or providing military information (Article 422), crime of refusing to relay military orders, or relaying false military order (Article 422), crime of surrender (Article 423), crime of fleeing from battlefield (Article 424), crime of obstructing from performance of military duties (Article 426), crime of military personnel’s fleeing the country (Article 430), crime of stealing, spying, buying or illegally offering military secrets for overseas institutions, organisations, or personnel (Article 431(2)), crime of fabricating rumours in wartime (Article 433(2)), crime of stealing or

serious crimes'; and run against China's policy of strict limits on capital punishment. It might be evidenced from the classification of violent and non-violent crimes, comparison of capital charges in the 1979CL and 1997CL, and the relevant legislative pattern.

The death penalty appears to apply to more non-violent than violent crimes in the 1997CL. It tries to distinguish between violent and non-violent crimes according to whether they are committed in violent ways and directly endanger personal security⁶⁵⁴. There are 358 non-violent crimes and 63 violent crimes, among a total of 421.⁶⁵⁵ However, the death penalty as the legal maximum penalty for non-violent crimes is applied to 44 crimes in 8 major different kinds of crimes.⁶⁵⁶ These crimes account for approximately 65% of all capital charges and 12% of total non-violent crimes⁶⁵⁷. This appears not to indicate that China strictly limits the applicable scope of capital punishment.

In comparison with 38 capital charges in both the 1979CL and Provisional Regulations on Punishing Military Personnel for Violation of Duty, adopted in 1981, the 1997CL has increased the number by 30. With the campaign of 'Strike Hard', 12 separate criminal laws were successively promulgated and 33 more capital charges were added from 1982 to 1995. The total number rose to 71, excluding overlapping crimes, which was revised to 68 in the 1997CL. This appears to reduce the number of capital charges by 3, while at the same time increasing the scope of crimes punishable by death. In effect, the 1997CL has abolished three such crimes⁶⁵⁸ yet increased several ones⁶⁵⁹ exclusive of those that have been disassembled.

Specifically, the number of capital charges in 1997CL Chapter One has decreased by 6 although the scope of the offences remains the same.⁶⁶⁰ The charges

forcibly seizing weaponry or war material (Article 438), and crime of illegally selling, transferring weapons or equipment of the armed forces (Article 439), crime of cruel injure of innocent residents in wartime (Article 446)

⁶⁵⁴ Huang Jingping & Shilei, in Zhao Bingzhi/2004/8

⁶⁵⁵ AI 7; 14-15

⁶⁵⁶ These include 5 kinds of crimes on Crimes of Endangering National Security, 3 on Crimes of Endangering Public Security, 16 on crimes of Undermining the Order of Socialist Market Economy, 1 on Crimes of Encroaching on Property, 5 on Crimes of Disrupting the Order of Social Administration, 2 on Crimes of Endangering the Interests of National Defense, 2 on Crimes of Graft and Bribery, and 10 on Crimes of Violation of Duty by Military Personnel.

⁶⁵⁷ Huang Jingping & Shilei, in Zhao Bingzhi/2004/8-9

⁶⁵⁸ Crime of organising or using superstitious sects engage in counterrevolutionary activities; crime of carrying on counterrevolutionary activities through feudal superstition; crime of sabotaging weaponry.

⁶⁵⁹ 1997CL Articles 125(2), 369(1), 370(1), 422 and 439

⁶⁶⁰ The original crime of secret service was merged into crime of espionage, the previous crime of instigating

of two crimes, namely illegal speculation and profiteering, and hooliganism, have been removed and the crimes reclassified as several diverse charges. They still carry the death penalty in their most severe form. The crimes of manufacturing or selling fake medicine and of manufacturing or selling toxic or harmful foodstuff retain the death penalty. The crime of affray, however, only receives it under the circumstances of causing personal death or injury, as a crime of injury or homicide, according to the principle of punishing the implicated offence⁶⁶¹ in 1997CL Article 292.

Moreover, two capital charges of the crime of stealing valuable cultural relics and of abducting and trafficking in people, have been abolished and the crimes incorporated into a new charge and another broad one,⁶⁶² both of which retain the death penalty. The crime of falsely making out specialized value-added-tax receipts and crime of falsely making out other receipts to obtain tax refunds or non-payment are also combined into one capital charge.

After the signing of the ICCPR in 1998, no specific criminal laws, judicial interpretations or amendments to the 1997CL increase the scope of the death penalty in China. There are two points worthy of note.

First, the Amendment III to the Criminal Law of the People's Republic of China was reported to prescribe the application of capital punishment to crimes of terrorism,⁶⁶³ which misunderstood its real meanings. Actually, the act of terrorism shall be punishable by death as one of the crimes that endanger public security and not those of terrorist organizations. The use of capital punishment is unlikely to increase the extent of this penalty.

Second, 'Guangdong bag snatchers may face the death penalty'⁶⁶⁴, which never brings any increase in its use. The acts of drive-by thieves with violence

rebellion and crime of armed mass rebellion were combined into the crime of armed rebellion; crime of organising a mass prison raid and crime of organising a jailbreak were brought into crimes of disrupting the order of social administration; original crime of counterrevolutionary sabotage, crime of counterrevolutionary murder and crime of counterrevolutionary homicide or injury apply punishments of crime against public security, crime of intentional murder and injury with the abolition of their charges.

⁶⁶¹ It is Qianlian Fan in Chinese, which is defined as a circumstance where criminals commit offences whose purpose constitutes one crime and criminal means or results does another crime.

⁶⁶² They are the crime of smuggling valuable cultural relics and of abducting and trafficking in women and children.

⁶⁶³ China 3

⁶⁶⁴ AI 29

constitute the crime of robbery, which appears to fall within the original extent of capital punishment.

Moreover, there is no decrease in the applicable scope of capital punishment after 1998. The basically unchanged scope seems not to directly breach the relevant provisions in the ICCPR. But the extensive use of capital punishment might go against China's official death penalty policy and give a broad coverage to 'the most serious crimes' provided in ICCPR Article 6(2).

Additionally, one of the legislative patterns of the death penalty is the 'absolute punishment of the death penalty'⁶⁶⁵ for certain crimes⁶⁶⁶. This takes the death penalty as the sole and mandatory punishment, regardless of the diverse circumstances of such crimes. Other lighter penalties would not be applied to replace with capital punishment at the discretion of judges. This leaves no possibility of limiting and reducing the imposition of capital punishment for these crimes under any circumstances. Even if these crimes could be explained as 'the most serious crimes' punishable by death, the legislative pattern appears not to justify this case 'as a quite exceptional measure'.⁶⁶⁷

3.2.3 Procedural Criminal Laws on the Death Penalty

The other significant category of laws on the death penalty is procedural criminal provisions, which can be mainly found in the 1996CPL. Under the Chinese legal system, following the investigation by public security organs,⁶⁶⁸ the PPs,⁶⁶⁹ or State security organs,⁶⁷⁰ the PP shall initiate public prosecution of capital cases in a PC⁶⁷¹. The PCs 'shall apply the system whereby the second instance is final' in trying cases.⁶⁷² Apart from these ordinary procedures, the procedure for review of death sentences is necessary for cases involving death sentences⁶⁷³, followed by

⁶⁶⁵ Hu Changlong/2003/177

⁶⁶⁶ They are the 5 crimes of the Crimes of Endangering National Security, including treason, the crime of splitting the country, crime of defecting to the enemy and turning traitor, crime of stealing, secretly gathering, purchasing, or illegally providing State secrets or intelligence for an organisation, institution, or personnel outside the country, the crime of supporting enemy; the crimes of the Graft and Bribery, and the crime of fabricating rumours to mislead people on the Crimes of Violation of Duty by Military Personnel.

⁶⁶⁷ GC/6(6)/[7]

⁶⁶⁸ 1996CPL Articles 3, 18

⁶⁶⁹ Ibid.

⁶⁷⁰ 1996CPL Article 4

⁶⁷¹ 1996CPL Article 3

⁶⁷² 1996CPL Article 10

⁶⁷³ 1996CPL Articles 199-202

those for enforcement⁶⁷⁴, or for trial supervision⁶⁷⁵, of such sentences. The complex cases have demonstrated their unique features in a range of special and ordinary procedures. These issues will be examined more closely to ascertain China's practice and policy on capital punishment.

3.2.3.1 Ordinary procedures

Ordinary procedures are designed for all criminal cases, including capital cases. Generally, they are classified as two kinds, namely, the essential procedure for the first instance and the alternative one for the second instance.

As capital cases involve the right to life, the 1996CPL requires stricter details to protect this right in all procedures for such cases than those for others. The jurisdiction systems and legal rights of those facing the death penalty⁶⁷⁶ are essential for fair trial in the first and second instances of capital cases. It is desirable to separately address them as the common part of their ordinary procedures prior to other details of these procedures.

3.2.3.1.1 *The jurisdiction*

The jurisdiction is the precondition and preparation of judicial activities in criminal proceedings. It was generally defined as the partition of the scope of accepting cases by the public security organs, PPs, and PCs, and of the competence of various PCs in criminal trials.⁶⁷⁷

After the investigation by the public security organs, PPs, or State security organs,⁶⁷⁸ the PP shall initiate a public prosecution, considering ascertained facts and reliable and sufficient evidence.⁶⁷⁹ This prosecution is based on the 'provisions for trial jurisdiction'⁶⁸⁰ designed to facilitate both just and efficient procedures in judicial proceedings. The second-instance PCs are the next level of the first-instance ones. The trial jurisdiction will be examined on advantages and disadvantages of first-instance courts.

⁶⁷⁴ 1996CPL Articles 208-224

⁶⁷⁵ 1996CPL Articles 203-207

⁶⁷⁶ 1996CPL Article 82(4)

⁶⁷⁷ Chen Guangzhong/1996/78; Hu Changlong/2003/177

⁶⁷⁸ 1996CPL Articles 3, 4, 83

⁶⁷⁹ 1996CPL Article 141

⁶⁸⁰ Ibid.

3.2.3.1.1.1 Advantages

Under the 1996CPL, the jurisdiction is classified as grade, district, designate and exclusive jurisdiction.⁶⁸¹ On the basis of grade jurisdiction, capital cases shall be heard in well-qualified courts at the higher level to ensure the good quality and effect of trials, excluding the BPCs.

The IPCs shall have jurisdiction, in the first instance, over criminal cases endangering State security, ordinary cases punishable by the death penalty, or cases involving foreign offenders.⁶⁸² All of these cases have serious social consequences and wide influential scope. Ordinary crimes punishable by death are overlapped with others involving State security or foreigner offenders, which are also likely to be punishable by death.

Moreover, both the HPCs 'have jurisdiction as courts of first instance over major criminal cases', of such a kind, 'that pertain to an entire province', as the SPC has in 'the whole nation'.⁶⁸³ The PCs at higher levels may try such cases if necessary, over which the PCs at lower levels have jurisdiction in the first instance, either on their own initiative or upon the request of those at the next lower level.⁶⁸⁴ Thus, this jurisdiction tends to completely exclude the BPCs from hearing capital cases.

According to the principle of district jurisdiction, the PCs in the area where crimes were committed shall have jurisdiction over such cases, unless where 'the defendant resides' is 'more appropriate'.⁶⁸⁵ Among two or more PCs under the jurisdiction of these cases at the same level, the PCs that first accepted them or 'in the principal place where the crime was committed' shall try them.⁶⁸⁶

Furthermore, the designate jurisdiction of capital cases means that the PCs at a higher level may instruct the PCs at a lower level to try or transfer them to another one, where the jurisdiction is not certain. Meanwhile, the special jurisdiction is separately stipulated, considering the particularity of specialised PCs.

⁶⁸¹ 1996CPL Articles 20-27

⁶⁸² 1996CPL Article 20

⁶⁸³ 1996CPL Article 21-22

⁶⁸⁴ 1996CPL Article 23

⁶⁸⁵ 1996CPL Article 24

⁶⁸⁶ 1996CPL Article 25

Hence, in view of a series of factors to contribute to the above trial jurisdiction over criminal cases punishable by death, it is desirable to consider the IPCs as first-instance ones at the lowest level. This jurisdiction determined by law tends to ensure such tribunals that hear capital cases to be lawfully established, which conforms to the requirement of a competent tribunal established by law provided in ICCPR Article 14(1).

3.2.3.1.1.2 Disadvantages

There is no explicit provision on who has the power to determine criminal cases to be punishable by death in 1996CPL Article 20(2). Interpretation of the SPC on Some Issues in Enforcement of the 1996CPL issued in 1998 Article 4 regulated that the IPCs shall try such cases from the PPs and not return them to the BPCs, even if they considered that there is no need for death sentences. The jurisdiction appears not to be established by law in a strict sense.

3.2.3.1.2 *Rights of Those Facing the Death Penalty*

3.2.3.1.2.1 General

The 1996CPL has improved procedural rights of persons facing the death penalty on the basis of the relevant provisions in the Criminal Procedure Law of the PRC in 1979. These rights could be divided into three categories in light of their nature and function.

The first is the right concerning the defence or legal aid, which is used for the defending party to oppose the accusing one. It includes ‘the right to use their native spoken and written languages’,⁶⁸⁷ and the right to be informed and attend cross-examination in court. Minor criminal suspects or defendants have the special right to attend interrogation and trial with their legal representatives.⁶⁸⁸

The second is the right to request that a judicial body examine, change or withdraw disadvantageous acts, decisions or judgements of another body. Apart from the right to appeal or present a petition, the convict also has the right to demand withdrawals⁶⁸⁹ or to ‘apply for reconsideration once’ for rejection of this

⁶⁸⁷ 1996CPL Article 9

⁶⁸⁸ 1996CPL Article 14

⁶⁸⁹ 1996CPL Article 28

application.⁶⁹⁰ They also have the ‘right to file charges against judges, procurators and investigators whose acts infringe on their procedural rights or subject them to indignities.’⁶⁹¹

The third includes procedural rights inferred from the legal obligations of judges, prosecutors and investigators. They mainly involve the right of equality before the law⁶⁹², of no conviction without a PC’s sentence according to law,⁶⁹³ of a public, independent and fair trial,⁶⁹⁴ of *ne bis idem*⁶⁹⁵ and of *nulla poena sine lege*⁶⁹⁶.

3.2.3.1.2.2 Rights to defence and legal aid

As vital procedural rights, the rights to defence and legal aid have a direct influence on preventing a miscarriage of justice with regard to death sentences. Both will be respectively examined in detail below.

3.2.3.1.2.2.1 The defence system

Under Constitution of the PRC adopted in 1982 Article 125,⁶⁹⁷ the defence system deals with a range of different aspects in China, mainly in accordance with the 1996CPL and 1997CL. This relates to the preparation of defence provided in ICCPR Article 14(3)(b).

The first is the broad scope of defenders. Apart from exercising this right by himself, suspects or defendants may entrust defenders⁶⁹⁸ or a designated lawyer. The PC is ‘obligated to provide legal aid’ to the defence due to the possibility of sentences comprising the death penalty.⁶⁹⁹ The entrusted defenders may be lawyers, ‘persons recommended by a public organization or the unit’ where he works, or his guardians, relatives and friends, excluding those under criminal punishments or

⁶⁹⁰ 1996CPL Article 30

⁶⁹¹ 1996CPL Article 14

⁶⁹² 1996CPL Article 6

⁶⁹³ 1996CPL Article 12

⁶⁹⁴ 1996CPL Article 5

⁶⁹⁵ 1997CL Article 10; 1996CPL Article 197

⁶⁹⁶ 1996CL Article 12

⁶⁹⁷ 1996CPL Article 125

⁶⁹⁸ 1996CPL Article 32

⁶⁹⁹ 1996CPL Article 34

restricted personal freedom.⁷⁰⁰ This tends to offset the shortage of lawyers and relieve the difficulty of entrusting them. It appears to contribute to the communication of the accused with counsel of his own choosing and preparation of his defence that is required by ICCPR Article 14(3)(b).

Secondly, defenders intervene in the criminal process after a case is transferred for examination prior to prosecution. The PP is required to inform criminal suspects of the right to entrust defenders ‘within three days from the date’ of receiving the transferred case file.⁷⁰¹ This appears to safeguard certain time to prepare for the defence of the accused provided in Article 14(3)(b).

Thirdly, a criminal suspect has the right to ‘appoint a lawyer to provide him with legal advice and to file petitions and complaints on his behalf’ during the investigation, as per 1996CPL Article 96. With such limited legal service, this lawyer does not appear to play an important part in effectively safeguarding the rights of the criminal suspects at this stage. This might influence the adequate preparation of defence at the next stage.

Fourthly, defenders both enjoy legal rights and undertake obligations, which appears to contribute ‘facilities for the preparation’ of the defence provided in Article 14(3)(b). Specifically, they are responsible for presenting materials and opinions, either to testify to the innocence of criminal suspects or defendants, or the mildness of their crimes, as well as the need for a mitigated or exempted criminal responsibility, according to the facts and law.⁷⁰²

From examination of a case for prosecution, defence lawyers may consult, extract and duplicate the judicial documents and technical verification materials concerned, or meet and correspond with the suspect in custody.⁷⁰³ With the permission of the PP, other defenders have the above rights. In trial, defence lawyers may ‘consult, extract and duplicate the material of the facts of the crime accused’, or ‘meet and correspond with the defendant in custody’, as other defenders may with the permission of the PC.⁷⁰⁴

⁷⁰⁰ 1996CPL Article 32

⁷⁰¹ 1996CPL Article 33

⁷⁰² 1996CPL Article 35

⁷⁰³ 1996CPL Article 36(1)

⁷⁰⁴ 1996CPL Article 36(2)

Moreover, defence lawyers may collect information from witnesses and other bodies or individuals concerned, apply to the PP or PC for collecting it, or request the PC to inform them of giving testimony.⁷⁰⁵ From the victim, his near relatives or witnesses provided by the victim, they must request their consent and the permission of the PP or PC.⁷⁰⁶

However, defenders are obliged not to ‘help criminal suspects or defendants conceal, destroy or falsify evidence or to tally their confessions’.⁷⁰⁷ They are not permitted to ‘intimidate or induce the witnesses to modify their testimony or give false testimony or conduct other acts’ to interfere with criminal proceedings.⁷⁰⁸

Fifthly, the defendants have the right to refuse defence. They may refuse the defence of the first defender and entrust someone else at any stage during the trial in order to effectively exercise the right to defence.⁷⁰⁹ Accordingly, this also contributes to the preparation of defence provided in ICCPR Article 14(3)(b).

However, there still remain some limitations to the relevant provisions, which seems to denigrate the practice of the right to a defence and even remove the balance between both parties. This does not fully meet the requirement of ICCPR Article 14(3)(b) and 3(e).

Firstly, there is the intervening time between when the investigation begins and when the lawyer starts. During this time the advisors cannot provide the legal service in preparing the criminal defence. The criminal suspects have to defend themselves at that stage.

Secondly, defence lawyers cannot read judicial documents or technical testimonials until the PP’s examination for prosecution, neither can other defenders read these documents without permission of the PP. Accordingly, they appear not to obtain the main evidence materials, but only opinions recommending prosecution and testimonials considered important to defence. Meanwhile, the lawyers can collect the factual material concerning the alleged crimes, as other defenders can with the permission of the PC. However, the problem is that there is no explicit provision in the laws or judicial interpretations concerned, to clearly

⁷⁰⁵ 1996CPL Article 37(1)

⁷⁰⁶ 1996CPL Article 37(2)

⁷⁰⁷ 1996CPL Article 38(1)

⁷⁰⁸ Ibid.

⁷⁰⁹ 1996CPL Article 39

specify what constitutes this material. This appears to prevent them from reading all the materials which might be necessary to the case.

The third limitation is on the investigation to obtain evidence. Defenders cannot investigate the facts of a case during investigation by investigative bodies. This appears to hamper them from collecting necessary evidence in time.

With the consent of witnesses and other units or individuals concerned, defence lawyers may obtain information from them, which inevitably means that some witnesses may refuse. This tends to go against the duty to testify of 'those who have information about a case' pursuant to 1996CPL Article 48. It also appears to remove the balance between the accused and the PP.

It is the case with the difficulties for defence lawyers in collecting information from the victim, their relatives, and witnesses provided by the victim. This lies in the fact that both their consent and the permission of the PP or PC are prerequisites. Additionally, without specific applicable conditions, the PP or PC seems arbitrarily to permit or refuse the defence lawyers' application for investigation to obtain evidence or inform witnesses about giving testimony in court.

The fourth limitation is on measures to safeguard practising lawyers. 'When the lawyer meets with the criminal suspect in custody', under 1996CPL Article 96, 'the investigation organ may, in light of the seriousness of the crime and where it deems it necessary, send its people to be present at the meeting.' It also stipulated that '[I]f a case involves State secrets, before the lawyer meets with the criminal suspect, he shall have to obtain the approval of the investigation organ.' This may influence the effect of their meetings so that the lawyer would not efficiently practise law to safeguard the legitimate rights of criminal suspects. Furthermore, 1997CL Article 306 specifies the crime of defender and agent ad litem's destroying evidence, falsifying evidence, or interfering with witnesses. This appears to lead to more hazards for defence lawyers in the criminal process.

3.2.3.1.2.2.2. The system of legal aid

The 1996CPL provides for a system of legal aid in the process of criminal cases⁷¹⁰, which was specified by the 1996LL. This system contains several important features.

Firstly, practising lawyers exclusively undertake the obligation to provide the legal aid in criminal procedures among entrusted defenders. With more legal knowledge and rights than other defenders, it appears that defence lawyers are likely to offer legal aid of good quality.

Secondly, the sole period for the operation of this system is during the trial of a case. 1996CPL Article 151 requires that the PC designate a defence lawyer to provide the legal aid no later than ten days before the court session. Thus, criminal suspects tend to obtain this aid during the trial instead of during the investigation or prosecution.

The third is the applicable scope of this system. 1996CPL Article 34 stipulated that the PC shall designate a defence lawyer for the defendant facing the death penalty, but without entrusting any defenders; and for the blind, deaf or mute, minor defendants, without any entrusted lawyer. Under 1996CPL Article 34, the defendant in a case brought to court by a public prosecutor, without entrusted lawyers, may, albeit not should, obtain this legal aid in the criminal process. The 1998IECPL further expands this scope to persons with reduced capacity, those with financial difficulty, codefendants with others to entrust defenders, foreigners, and to cases with a significant social influence or where there is the possibility of the suspect being incorrectly convicted.

Accordingly, the Chinese legislation on the system of legal aid seems to guarantee the right to legal aid provided in ICCPR Article 14(3)(d). Nonetheless, it is not the case. The legal terms of this system are limited to the trial of cases, rather than all of the stages of criminal proceedings. This is likely to undermine the protection of the interests of criminal suspects or defendants and even lead to unfair trials and misjudged cases.

3.2.3.1.3. Procedure for the first instance

⁷¹⁰ 1996CPL Article 34

The procedure for the first instance of capital cases in China is based on the legal requirements provided in the 1996CPL. This procedure basically runs as follows.

Only if the bill of prosecution contains clear facts of crimes punishable by death, with a list of evidence, witnesses, and duplicates or photos of major evidence attached, a PC shall ‘open the court session’ to try a capital case.⁷¹¹ This is the requirement for initiation of the first instance. Without explicit time limit, it does not mean to permit undue delay in hearing any case involving capital punishment. The PC ‘shall pronounce judgment on a case of public prosecution within one month or, one and a half months at the latest, after accepting it’, except for an extension of one more month upon approval or decision by the HPC.⁷¹² The HPC may allow the extension under such situations as ‘grave and complex cases in outlying areas where traffic is most inconvenient’; ‘grave cases that involve criminal gangs’; ‘grave and complex cases that involve people who commit crimes from one place to another’; and ‘grave and complex cases that involve various quarters and for which it is difficult to obtain evidence’.⁷¹³ There is no exception to any other circumstance, which appears to leave no room for undue delay of all criminal trials, especially those involving capital punishment, consistent with ICCPR Article 14(3)(c).

The subsequent preparatory work is to ‘determine the members of the collegial panel’, and to deliver to the defendant a copy of the bill of prosecution’ of the PP ‘no later than ten days before the opening of the court session’.⁷¹⁴ The document ‘shall be issued in the written language commonly used in the locality’ where ‘people of a minority nationality live in a concentrated community or where a number of nationalities live together in one area’.⁷¹⁵ This appears to ensure the accused to ‘be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him’ provided in ICCPR Article 14(3)(a). ‘If the defendant has not appointed a defender, he shall be informed that he may appoint a defender or, when necessary, designate a lawyer that is obligated

⁷¹¹ 1996CPL Article 150

⁷¹² 1996CPL Article 168

⁷¹³ 1996CPL Article 126

⁷¹⁴ 1996CPL Article 151

⁷¹⁵ 1996CPL Article 9

to provide legal aid to serve as a defender for him'.⁷¹⁶ This appears to contribute to the preparation of defence.

The PC also should notify the PP 'of the time and place of the court session three days before the opening of the session'; 'summon the parties and notify the defenders, agents ad litem, witnesses, expert witnesses and interpreters, and deliver the summons and notices no later than three days before the opening of the court session'; 'announce, three days before the opening of the session, the subject matter of the case to be heard in public, the name of the defendant and the time and place of the court session'.⁷¹⁷ The above-mentioned proceedings shall be recorded in writing with the signatures of the judges and the court clerk.⁷¹⁸ This appears to supply a good preparation for the participation of all parties, defenders, agents ad litem, witnesses, expert witnesses and interpreters. This increases the possibility of meeting the minimum guarantees provided in ICCPR Article 14(3)(d), (e) and (f) and even fair trial.

The public hearing is the principled approach of first instance in capital cases, with the exception of those 'involving State secrets', 'private affairs of individuals', or 'crimes committed by minors' between the ages of 14 and 16.⁷¹⁹ Minors above 16 and below 18, generally, are also precluded from this public hearing.⁷²⁰ 'The reason for not hearing a case in public shall be announced in court' without exception to cases involving capital punishment.⁷²¹ Such cases excluded from a public hearing fall into the category of the trials 'for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires' required by ICCPR Article 14(1). Accordingly, the relevant legislation of China appears to ensure the accused to be entitled to a public hearing and fully conform to ICCPR Article 14(1), even if several exceptions are permitted.

During a trial, the PP shall send its procurators to the PC to support the public prosecution.⁷²² During the court session, the presiding judge shall ascertain if all

⁷¹⁶ 1996CPL Article 151

⁷¹⁷ Ibid.

⁷¹⁸ Ibid.

⁷¹⁹ 1996CPL Article 152

⁷²⁰ Ibid.

⁷²¹ Ibid.

⁷²² 1996CPL Article 153

the parties have appeared in court and announce the subject matter of the case, and inform the parties of their right to apply for withdrawal.⁷²³ '[A]ny member of the collegial panel, the court clerk, the public prosecutor, any expert witnesses or the interpreter' could be withdrawn.⁷²⁴ During the cross-examination, the judges or the public prosecutor may interrogate the defendant and he may also be questioned by the other parties in the case,⁷²⁵ and a witness may answer questions on the testimony given.⁷²⁶ The public prosecutor or the defenders shall show the exhibits to the court for the parties to identify,⁷²⁷ and the collegial panel may announce an adjournment for investigation to verify the evidence.⁷²⁸ The defenders have the right to request the court to summon new witnesses, obtain new material evidence, make a new expert evaluation, and hold another inquest,⁷²⁹ and state their views.⁷³⁰ After their final statement, the collegial panel shall conduct its deliberations according to the established facts and evidence and under relevant laws in the adjournment, and pronounce the defendant to be guilty or innocent⁷³¹ in public.⁷³² These appear to conform to the minimum guarantees provided in ICCPR Article 14(3) and the requirement of a public hearing in ICCPR Article 14(1).

Furthermore, if a PP discovers a violation of the procedural laws by a PC handling a capital case, it shall have the power to suggest the PC set a fair sentence.⁷³³ This demonstrates the exclusive power of the PP and contributes to a fair trial.

3.2.3.1.4. Procedure for the second instance

The second instance is not a necessary procedure for any case involving death sentences and the initiation of the procedure for the second instance is conditional after conclusion of the procedure for the first instance. Following conclusion of the procedure for the second instance, death sentences tend not to be legally effective

⁷²³ 1996CPL Article 154

⁷²⁴ Ibid.

⁷²⁵ 1996CPL Article 155

⁷²⁶ 1996CPL Article 156

⁷²⁷ 1996CPL Article 157

⁷²⁸ 1996CPL Article 158

⁷²⁹ 1996CPL Article 159

⁷³⁰ 1996CPL Article 160

⁷³¹ 1996CPL Article 162

⁷³² 1996CPL Article 163

⁷³³ 1996CPL Article 169

until conclusion of the procedure for review of death sentences. In this respect, the procedure for the second instance appears to contribute to examination of first-instance death sentences and fair trial in the second instance. This process will be demonstrated in terms of the following aspects.

3.2.3.1.4.1 The Initiation

There are two means to start the procedure for the second instance of death sentences: the appeal of the defendants; or the prosecutorial protest against the judgement.⁷³⁴ The time limit is ten days, counting from the date of receiving it.⁷³⁵ Either way within the time limit may initiate it to exercise the right to an appeal.

3.2.3.1.4.1.1 The appeal of the defendants

The appeal of the defendants is one legal way to initiate the procedure for the second instance of death sentences, which is designed to protect the right to appeal of defendants facing the death penalty.

The defendant or his legal representatives who refuse to accept the first-instance judgement 'shall have the right to appeal in writing or orally' to the PC 'at the next higher level'.⁷³⁶ Only 'with the consent of the defendant' may defenders or near relatives of the defendant file appeals.⁷³⁷ These defenders, entrusted by the defender or designated by the PC, file appeals resolving around the conviction and sentence of the defendants.

Where the defendants exercise the right to appeal, the principle of no appeal resulting in additional punishment is applicable to this case. Literally, the principle refers to the fact that second-instance courts shall not increase punishments of the defendants in hearing cases that are appealed only by the defendants and their lawyers.⁷³⁸ This is designed to encourage the defendants to exercise the right of appeal without worry and ensure the procedural rights of the parties by law, in criminal cases. In view of the cautious application of the death penalty, this

⁷³⁴ 1996CPL Article 180-182

⁷³⁵ 1996CPL Article 183

⁷³⁶ 1996CPL Article 180

⁷³⁷ Ibid.

⁷³⁸ Hu Changlong/2003/238

principle appears to exclude the increase of punishments in any form upon the appeal of the side of defendants or other bodies in the interest of defendants facing capital punishment.

This criminal principle is applicable to capital cases, as reaffirmed in 1996CPL Article 190, 1998IECPL Article 278(3), and Regulations of the SPC, SPP, MOPS, MOSS, MOJ and NPCLC on Some Issues in Enforcement of the 1996CPL issued in 1998 Article 47. This mainly focuses on whether death sentences with a suspension of execution may be changed to ones with immediate execution. According to this principle, the second-instance PCs cannot make the above change to increase criminal punishments. There are two notable issues involved.

One is whether this leads to the increased criminal punishments of the defendants in a disguised form. 1998IECPL Article 257(5) permits the second-instance courts to change the original sentence of the death penalty with a suspension of execution to the death penalty with immediate execution where there is merely an appeal from the defendant's side. This is according to the procedure for trial supervision after death sentences have taken effect. Since the principle requires no additional punishments of defendants in any forms, including remand for retrial where sentences are deemed as too light, the increase in a disguised form tends to be against the principle in fact.

The other is whether the second-instance courts may change the original sentence to the death penalty with immediate execution upon the protest of the PPs. 1996CPL Article 190(2) stipulates that the second-instance PCs may increase the criminal punishments of the defendants with the PP's protest. This means that those facing the death penalty may be increased punishments and sentenced to death with immediate execution.

Moreover, the approval of death sentences with a suspension of execution should not increase the criminal punishments of the defendants in principle. According to 1998RECPL Article 47⁷³⁹ and 1998IECPL Article 278 (3)⁷⁴⁰, the

⁷³⁹ It regulates that the HPCs should decide whether to approve or not death sentences with two-year suspension of execution, without increasing the defendants' punishments, in approving such cases.

⁷⁴⁰ It regulates that the HPCs shall not increase the punishments of defendants by any means, e.g., advancing the instance, in approving cases of the death penalty with two-year suspension of execution.

HPCs shall not increase punishments of defendants by any means in the approval of such sentences.

Therefore, the principle of no appeal resulting in additional punishment does not appear to limit the application of capital punishment, but encourages the practice of the right to an appeal. This conforms to the right guarantee provided in ICCPR Article 14(5).

3.2.3.1.4.1.2 The prosecutorial protest

The prosecutorial protest against death sentences is the other way to start the procedure for the second instance of death sentences. It only applies to the cases where the defendants give up the right to appeal. This leaves no room for the principle of no appeal resulting in additional punishment.

In application, the PP shall present a protest to the PC at the next higher level, if it ‘considers that there is some definite error in a judgment or order of first instance’ made by a PC at the same level.⁷⁴¹ ‘If the victim or his legal representative refuses to accept a judgment of first instance’, ‘he shall, within five days from the date of receiving the written judgment, have the right to request’ the PP ‘to present a protest’.⁷⁴² The PP shall ‘within five days from the date of receiving the request made by the victim or his legal representative’, ‘decide whether to present the protest or not and give him a reply’.⁷⁴³

The 1996CPL excludes the victim from filing appeals for initiation of the procedure for the second instance. This seems not to fully protect the rights of the victim and even remove the balance between both parties, which is likely to have a negative influence on fair trial. However, the PPs, with strong State power and qualified prosecutors, contribute to initiating this procedure and safeguarding legal rights of the victim. This would not damage a fair trial, but equally safeguard the right to an appeal.

3.2.3.1.4.2 The Hearing Approach

⁷⁴¹ 1996CPL Article 181

⁷⁴² 1996CPL Article 182

⁷⁴³ Ibid.

The hearing approach directly influences the quality of second-instance sentences. A proper hearing tends to ensure procedural justice and correct wrong death sentences handed out in the first instance.

1996CPL Article 187 provides for the public hearing as the primary approach and the written examination and interrogation as the secondary. The public hearing appears to favour correcting misjudged cases more than the written examination. The combination of both approaches appears not to ensure the right to a public hearing.

Pursuant to the SPC's Notice on Further Doing Well the Work of Public Hearings in the Second Instance of Death Sentence Cases, the HPCs should try such second-instance death sentences that are lodged the appeal on important facts and evidence, in public hearing from 1st January 2006.⁷⁴⁴ The public hearing is also expected to be applied to all death sentences without exception in the second instance by the end of 2006.⁷⁴⁵ Since the procedure for the second instance is the one before that for review of death sentences, the public hearing appears to play an essential role in protecting the rights of those facing the death penalty. This hearing approach conforms to ICCPR Article 14(1) and makes the right to an appeal meaningful consistent with ICCPR Article 14(5).

3.2.3.2 Procedure for review of death sentences

The procedure for review of death sentences is a special system, which operates in the following way. This seems to ensure the right to have death sentences be reviewed by a higher tribunal and contribute to a fair trial in hearing capital punishment cases. Firstly, the PCs review the death sentences, after which they approve them to ensure just sentences and avoid unjust or wrong cases. Only following this approval can death sentences be taken to be final and effective. It is the indispensable procedure for handling capital cases and plays an important role in implementing the death penalty policy of China.

3.2.3.2.1 Approval scope

⁷⁴⁴ The SPC, in *NLR/2006/7/47*

⁷⁴⁵ *Ibid.*

The approval scope of the procedure for reviewing death sentences refers to the scope of such death sentences that need to be reviewed in this procedure. Since death sentences are divided into those with immediate execution and those with a suspension of execution in China, it is desirable to examine them separately.

As 1996CPL Article 199 regulates, the SPC shall approve all capital cases, without exception to those involving death sentences with immediate execution. Differing from that, 1997CL Article 48(2) stipulates that all death sentences shall be submitted to the SPC for approval, except for judgements made by the SPC according to law. This exception seems to leave the possibility of excluding such sentences imposed by the SPC from the approval scope, whereas the judgements made by the SPC appear to fall within the category under the approval of the SPC by 1996CPL Article 199. In fact, it is likely for highly qualified judges in the SPC to misjudge complex cases, while there is no express provision on whether different judges shall review and approve the judgments made by the SPC. This appears not to exclude the possibility of combining the procedure for the first or second instance with that for review, of death sentences within the SPC.

Moreover, Article 201 of the 1996CPL stipulated that the HPCs should review death sentences with a suspension of execution imposed by the IPCs. This seems to merely deal with the sentences imposed by the IPCs, rather than those by the SPC or HPCs. While the HPCs may sentence or review all of such sentences as outlined in 1997CL Article 48, it is generally accepted that they do not actually review those sentenced by the SPC and HPCs.⁷⁴⁶ This appears to exclude all the sentences made by the SPC or HPCs in the first or second instance.

Hence, the above approval scope seems unclear and limited. This appears to indicate that not all death sentences could be reviewed by the review procedure to realise the potential justice of them.

3.2.3.2.2 Approval power

The approval power of death sentences refers to the power whereby the PCs examine such sentences in a comprehensive manner to decide and approve whether

⁷⁴⁶ Zhang Yongjiang & Shu Hongshui, in *HLS/2005/1*

to carry out death sentences or not.⁷⁴⁷ Its effective practice provides for the rational operation of the procedure for review of death sentences.

The HPCs consistently exercise the power to review death sentences with a suspension of execution according to the 1997CPL and 1996CPL⁷⁴⁸. In contrast, the power to review those with immediate execution is changeable and has been a vexed issue with serious problems since 1980. It is desirable to focus on the latter power to throw more light on the attitude of the State towards capital punishment.

3.2.3.2.2.1 The Course of Transference

The transfer of this power has undergone a long process of evolution on the basis of the sole approval by the SPC stipulated in the 1979CL and 1979CPL. From 1980, it began to evolve from a joint practice of the SPC and HPCs, through the exclusivity of the SPC, the resumption of its joint form, and to the present transition into exclusivity of the SPC.

At first, the 13th session of the fifth Standing Committee of the NPC approved the proposal of authorising the HPCs to review some death sentences within the year of 1980 by the Procurator-General of the SPP on behalf of the SPC and SPP on 12th February 1980.⁷⁴⁹ On 10th June 1981, the 19 session formulated the Decision on the Issue of Power to Approve Death Sentence Cases, adopted in 1981, to extend the approval power of the HPCs to more death sentences from 1981 to 1983.⁷⁵⁰ On 2nd September 1983, under the influence of 'Strike Hard',⁷⁵¹ the 2nd session of the sixth Standing Committee of the NPC passed the Decision regarding the Revision of the 1983OL to further expand the extent of death sentences reviewed by the HPCs.⁷⁵² Pursuant to it, the SPC issued the Notice on Authorizing HPCs and Military Courts of People's Liberation Army to Approve Part of Death Sentences on 7th September 1983. Accordingly, every HPC and the Military Court of the PLA have the power to review and approve such death sentences that seriously endanger public or social security.⁷⁵³

⁷⁴⁷ Hu Changlong/2003/250

⁷⁴⁸ 1996CPL Articles 201-202

⁷⁴⁹ The NPC Standing Committee, in *JWH*/1981/1/471-472

⁷⁵⁰ CLRC/1986/50

⁷⁵¹ Li Zhufeng, in *JQU*/2006/1/36

⁷⁵² CLRC/1986/3

⁷⁵³ The Research Office of the SPC/1994/819

In the 1990s, the SPC made three decisions on authorising the HPCs to approve death sentence cases concerning drug-related crimes.⁷⁵⁴ It respectively authorised the HPCs in Yunnan Province on 6th June 1991 and Guangdong Province on 18th August 1993. Later, on 18th March 1996, Guangxi Province, Sichuan Province and Gansu Province were also granted this power on such crimes, except for those sentenced by the SPC or involving foreign affairs.

Later, both the 1996CPL and 1997CL required the SPC to unify this power to approve death sentence cases. Subsequently, however, on 26th September 1997, the SPC issued the 1997NDS.⁷⁵⁵ Accordingly, the HPCs and military courts of China resumed the practice of this power with the SPC.

On 26th October 2005, the SPC adopted the 2nd Five-Year Reform Program of the PCs. Among 50 measures, it is of great concern that the SPC shall unify the power to review and approve death sentences. This decision has been fixed, followed by a preparation of further specific work.

This zigzag course tends to demonstrate several primary features. Firstly, the PCs at the higher level have the power to approve death sentences.⁷⁵⁶ Both the SPC and HPCs have more highly qualified and experienced judges, better equipment and technological means than the lower courts, and this improves the chances of just death sentences.

Secondly, it was at the initial stage of implementing the policy of reform and opening-up in 1980s that the power to approve death sentences was first transferred to a lower level in order to crack down on some severe crimes. Without the realisation of the expected aim, the 1983OL was formulated in the form of general laws to affirm this transfer and to strengthen the deterrence of such crimes.

⁷⁵⁴ Ibid./157, 159; Ibid./1997/157-159; Ibid/2002/1467

⁷⁵⁵ Ibid/2003/1467-1468. The 1997NDS provides that from the day when revised the 1997CL was officially enforced in 1st October 1997, except for those sentenced by the SPC, death sentences in all areas, for the crimes of endangering national security, provided in Chapter One of the 1997CL, crimes of disrupting the order of the socialist market in Chapter Three, crimes of embezzlement and bribery in Chapter Eight, still should be approved by the SPC, following the second instance or approval by HPCs and military courts of China. For crimes provided in Chapter Two, Chapter Four, Chapter Five, Chapter Six (except for drug-related crimes), Chapter Seven and Chapter Ten, the power to approve death sentences (except for those sentenced by the SPC or concerning foreign affairs), according to 1983OL Article 13, the SPC authorises both the HPC in every province, autonomous region, or municipality directly under the Central Government and military courts of China for practice. However, death sentences concerning Hong Kong, Macao and Taiwan, should submit to the SPC for approval prior to first-instance of pronouncement of judgements, and those for drug-related crimes, except that the HPC authorised the approval power of some death sentences, other HPCs and Military Courts of PLA should submit to the SPC for approval after the second instance or review.

⁷⁵⁶ Chen Weidong & Zhang Tao/1992/169-171

Thirdly, the SPC exclusively approved death sentences for around one year in fact, which is far less than the period when the HPCs have exercised this power directly in accordance with pertinent laws.⁷⁵⁷ In the year after the 1996CPL, the 1997NDS reaffirmed the transference of the power to review death sentences on the basis of the 1983OL, before the 1997CL came into effect.

Fourthly, the procedure for review of death sentences is very important and complicated. The SPC, SPP and MOJ have not yet reached the agreement on such issues as initiation means, the subject of litigation, participants in criminal proceedings, examination approaches and term limits.⁷⁵⁸ The practical restoration of the power to review them appears to be at a preparatory stage.

3.2.3.2.2 Assessment

The joint practice has both advantages and disadvantages. On the one hand, this appears to relieve the work load of the SPC, to improve procedural efficiency of death sentences, and to rapidly crack down on those severe crimes punishable by death. It is mainly for the reason of procedural efficiency rather than justice that the SPC transferred the power to approve death sentences to the HPCs.⁷⁵⁹

On the other hand, the long-period transfer of the power to approve a wide range of death sentences appears to lead to serious problems. These are mainly the legal conflicts among three basic laws, diverse standards and unequal treatment among citizens in the application of capital punishment, and the combination of the procedures for the second instance and review of death sentences. This appears not to fully safeguard the right of those facing the death penalty ‘to his conviction and sentence being reviewed by a higher tribunal according to law’ by ICCPR Article 14(5). It also violates the right of all persons to ‘be equal before the courts and tribunals’ and further to a fair hearing provided in ICCPR Article 14(1).

Specifically, the 1983OL and 1997Notice appear to conflict with the basic laws of the 1996CPL and 1997CL. The SPC formulated the 1997 Notice on the basis of the 1983OL to reaffirm transferring the power to review some death sentence cases to the HPCs and Military Court of PLA prior to the implementation

⁷⁵⁷ They are passed by the NPC Standing Committee, or delegated by the SPC according to laws.

⁷⁵⁸ Law-lib 1, in Caijing; Zhou Daoluan, in *SF*/2005/6/12-14; Luo Shuping, in *CL*1/2006/2/45-46; Liu Yingjie, in *JLACPJ*/2006/58

⁷⁵⁹ Chen Guangzhong & Xiong Qihong, in *ZF*/1995/5

of the 1997CL. But the above basic laws have superior legal effects than that of the 1983OL as general laws and the 1997Notice as judicial interpretations, according to the principle of new laws being superior to old ones in legal effect.

Moreover, they were enacted after many years' joint practice of the power to review death sentences by the SPC, HPCs and Military Court of PLA, with the intention of taking back this power from the other bodies for the sole practice by the SPC. Since basic laws regulated the obligation of the SPC to review all capital cases, the SPC shall not give up but fulfil it by laws. Hence, there is no legal basis for the SPC to transfer the power to approve some death sentences.

Secondly, the SPC authorised some severe criminal cases for the HPCs, while retaining responsibility for those involving the economy, foreign affairs, or endangering State safety. Diverse understandings may lead to inconsistent standards in the application of capital punishment among the 31 HPCs and the Military Court of the PLA. This is likely to increase the number of executions under the influence of 'Strike Hard'. Moreover, death sentences for the same crime appear to be approved by the SPC in one place but not in another. Those involving foreigners or grafters facing the death penalty shall be reviewed and approved by the SPC, while most of the ordinary Chinese citizens are reviewed by the HPCs.⁷⁶⁰ This tends to lead to the unequal treatment of convicts sentenced to death and is operated against the principle of equality before courts and tribunals.

Thirdly, with merely one trial committee to discuss death sentences in every HPC, this transfer tends to lead to the combination of the procedure of the first or second instance with that for review of death sentences. Without the opportunity of a rigorous review as a last procedural safeguard, the possibilities of misjudged death sentences are increased. Meanwhile, the shortcomings of the procedure for the second instance of death sentences would worsen the miscarriage of justice in some capital cases. The transfer appears not to ensure a fair trial in these cases or the cautious application of capital punishment, but deviates from the official policy on capital punishment.

3.2.3.2.3. *Means*

⁷⁶⁰ Chen Zheng & Cai Yongtong, in *JGZXX*/2005/6/95

1996CPL Articles 199 to 202 explicitly address the procedure for review of death sentences, without no mention of the specific content, approach or term of this procedure. This leaves much room for various means in the procedure. The Notice of the Supreme People's Court on Several Rules Concerning Submitting Death Sentences for Approval in 1979, and Interpretation of the SPC on Some Issues in Enforcement of the 1996CPL issued in 1998, stipulate that the HPCs review death sentences with a suspension of execution by means of reviewing files without a public hearing. The SPC follows the same approach in review of death sentences in practice, without the relevant provision in laws or judicial interpretations. Accordingly, the SPC and HPSC review death sentences in written and not in public hearing.

This approach has both advantages and disadvantages. It tends to improve efficiency, and saves both time and resources in reviewing death sentences. But the defending party is unlikely to participate in the process or argue his or her own opinions. Inevitably in cases where there is no arraignment, there is little or no chance of the defendants exposing other criminal suspects or crimes before the court, or no legal bases for changing original sentences. This is disadvantageous to guarantee the right to a fair trial of those facing capital punishment,⁷⁶¹ but might increase death sentences and executions, deviating from the penal policy of China.

3.2.3.3 Procedure for enforcement of death sentences

The enforcement procedure is the final one for death sentences in capital cases. This is the radical means to realise death sentences and to conclude criminal procedures of such cases.

3.2.3.3.1 *Executive bases and subjects*

3.2.3.3.1.1 Executive Bases

As the basic premise of this procedure, executive bases are sentences and orders of legal effects involving the death penalty.

Specifically, 1996CPL Article 208 stipulates that 'judgments and orders against which no appeal or protest have been filed within the legally prescribed'

⁷⁶¹ Xue Jianxiang & Min Xing, in *NJCLJ*/2006/1-2/91

term, or 'of final instance' are those of legal effects. It also regulates death sentences approved by the SPC and death sentences with a suspension of execution approved by HPC within the scope of the executive bases. 1998IECPL Article 337 adds judgements or orders approved by the HPCs under the authorisation of the SPC in this scope.

Hence, the bases of enforcement should include three categories of judgements or orders. The first are those of death sentences with a two-year suspension of execution approved by the HPCs. The second are those of death sentences with immediate execution approved by the HPCs under the authorisation of the SPC. The third are those of death sentences with immediate execution approved by the SPC.

3.2.3.3.1.2 Executive Bodies

Unlike death sentences with a suspension of execution, death sentences with immediate execution are implemented by the PCs of first instance, instead of Prison Administrative Bodies, under 1998IECPL Article 341. The IPCs, HPCs and SPC may execute death sentences with immediate execution, according to 1996CPL Articles 20(2), 21 and 22.

This appears to have several advantages as follows. Since the defendants are held in custody within the jurisdiction of first-instance courts, these courts can make the best of their convenience to ensure rapid and orderly enforcement of death sentences within the legal term. Moreover, some accidents are likely to occur during the course of enforcement. As first-instance courts are familiar with the facts and the evidence of cases through the trial, they may rapidly investigate these accidents and determine whether to resume the enforcement without much delay. This appears to ensure exact and just execution and to improve efficiency in the procedure as well, this being a requirement of the judicial authority and the impartial enforcement of death sentences.

3.2.3.3.2 *Specific procedures*

At first, the signing and issuing of death sentence orders are the direct bases and indispensable process for the official start of the procedure for the enforcement of death sentences. Without such a mandate, there is no execution of death sentences,

even if legal papers are delivered and have become legally effective. 1996CPL Article 210 and 1998IECPL Article 338 specify that the president of the SPC or HPCs shall sign and issue orders of death sentences. This reflects the seriousness of the issue in hand and the gravity of the orders' implication.

Furthermore, 1996CPL Article 211 requires the lower courts to execute death sentences in seven days from the date of receiving the orders from the SPC. This appears to avoid criminals sentenced to death suffering enormous anxiety for a long time and means that executive bodies experience less of the unnecessary setbacks which might arise due to the bad behavior before the execution. Hence, this short term tends to give equal consideration to humanism and convenience in carrying it out.

Then, the legal executive bodies of death sentences, namely, first-instance courts of capital cases, undertake the preparatory work of the enforcement, by virtue of 1996CPL Article 212. The examination tends to make for lawful execution of death sentences. Subsequently, the courts are obliged to verify the identity of the criminal, and ask for any last words or letters, as dictated by 1998IECPL Articles 212(7) and 346. After the enforcement on the execution ground or designated site under 1998IECPL Article 346, they shall 'prepare a written record' and 'submit a report on the execution' to the SPC. The latter is based on provisions in 1996CPL Article 212(6) and 1998IECPL Article 347. This tends to protect the right to life against arbitrary deprivation, ensure humane treatment, and embody the official policy on the cautious application of the death penalty.

3.2.3.3.3 Enforcement approach

There are two primary means of executing death sentences, that is, shooting and injection, as 1996CPL Article 212(2) specifies. The Rules on Some Issues of Executing the Death Penalty by Shooting (Trial) further specifies the means and process of injection and detailed matters on the use of drugs in execution. This appears to be a sign of further civilisation and humanism of the execution means of capital punishment in China, and appears to contribute to procedural justness and efficiency in the enforcement.

However, there is no explicit provision on the right to a choice between being shot and receiving a lethal injection by those to be executed. This appears to leave the PCs to determine the means of execution, even if the executed applied for any specific means. The lethal injection is not the only execution method, but one of the choices available for the PCs. Since injection is generally considered to be the quicker means and causes less pain than shooting, persons being executed are likely to feel they are being treated unequally when different means are decided by the courts. Hence, this might breach the right to humane treatment specified in ICCPR Article 7.

3.2.3.3.4 The enforcement procedure for death sentences with a suspension of execution

Differing from death sentences with immediate execution, those with a suspension of execution shall be implemented by the first-instance PC. The procedure for their enforcement is similar to the enforcement of ordinary cases involving the fixed-term imprisonment.

They shall transfer the materials and defendants of such capital cases to prisons upon the approval by the HPCs by legal procedures. Prisons take charge of reform work of the defendants by means of RTL. Similar to the procedure for the enforcement of ordinary cases involving the fixed-term imprisonment, the first-instance PCs deliver legal files to police, detaining the criminal following effective judgments or orders. The police shall transfer the legal documents delivered by the PCs within one month. Finally, prisons shall check whether the documents are complete, examine the prisoner upon admission, and notify the criminals' relatives. Major human rights issues relating to forced labour inevitably arise and will be explained in Chapter V.

3.2.3.4 Procedure for trial supervision of death sentences

3.2.3.4.1 General

The procedure for trial supervision is a special one for criminal sentences that have taken effect, including death sentences with immediate execution and those with a suspension of execution. This lawful procedure is permissible and does not violate the principle of *ne bis in idem*. It is designed to correct wrongful death sentences

and ensure judicial justice, in conformity with the protection of the right to life from its arbitrary deprivation provided in ICCPR Article 6(1) and China's death penalty policy.

3.2.3.4.2 Advantages

This special procedure presents several features. Its main advantages could be analysed in the following way.

The first is its limited applicable scope. Distinct from the procedure for the first or second instance of death sentences, it merely applies to legally effective ones that could be incorrect. This appears to make the best of limited procedural resources to correct all death sentences possibly made in error.

The second is the special subjects of its initiation. Apart from the petition presented by a party, legal representative, near relative, or the protest by the PP, the PCs also play an active role in it, as stipulated by 1996CPL Articles 203 and 205. The president of the PC that finds errors in those sentences made by the PC shall refer the case to the trial committee's handling, and both the SPC and HPCs could initiate the retrial of the capital cases concerned. These broad subjects tend to correct a miscarriage of justice and contribute to a decrease in misjudged death sentences.

The third advantage is various legal conditions for the successful initiation. According to 1996CPL Article 204, the retrial may result from evidence for supporting facts, and punishment which is unreliable and insufficient, or contradict each other. Another condition is definite inaccuracy in the application of law and such illegal acts by the judges, such as embezzlement, bribery, or malpractices for personal gain, or bending the law in making death sentences. This offers a proper direction for the retrial of capital cases and correction of every potential error in death sentences.

The fourth is the principle of comprehensive examination. The PCs shall examine both factual and legal problems in the retrial of cases concerned, beyond the limits simply of petitions or protests. This appears to make for finding and correcting-improper death sentences and avoids misjudged capital cases and wrong executions.

3.2.3.5.2 Disadvantages

Likewise, the procedure of trial supervision has limitations, which might not fully protect the right to life from being arbitrarily deprived. Firstly, this procedure would not play a role in correcting potential miscarriage of justice in death sentences within a very short period before executions. The death sentences with immediate execution shall be executed within 7 days from the date when executive bodies receive the order for the execution, different from those with a two-year suspension of execution. The seven days seem to be too short to be corrected before the improper execution in the procedure.

The second is the limitation on initiation of this procedure. The PCs that initiate this procedure are likely not to provide a fair and impartial trial for death sentences, but to lead to misjudged death sentences with immediate execution. As a requirement for the initiation, there must be definite errors in the sentences. However, what amounts to such errors is unclear as there are no explicit provisions setting this out, leaving much room for the PCs or PPs to randomly initiate the procedure. Moreover, the legal process of examination by the PCs or PPs appears to be an obstacle to the defending party's successful start of the retrial procedure by appeals. It tends to be difficult for this party to properly start this procedure.

The third is the increase of executions. In accordance with 1996CPL Article 206 and 1998IECPL Article 312, death sentences with a suspension of execution may be revised to those with immediate execution. This seems to put the defendants at a disadvantage and increase the executions of death sentences.

Additionally, there is no limitation on times of retrying capital cases, which is likely to lead to random initiation of the retrial procedure. This might lead to more executions and run counter to the death penalty policy.

3.2.3.4.3 Procedure for compensation of death sentences

Both the 1982Constitution⁷⁶² and 1994SCL specify the procedure for compensation of death sentences. This is useful for promoting judicial fairness and safeguarding human rights in capital cases; and conforms to the compensation provision in

⁷⁶² 1982Constitution Article 41

ICCPR Article 14(6). Meanwhile, some disadvantages are likely to influence the realisation. Several features of this procedure will be analysed below.

Firstly, according to 1994SCL Article 15, this compensation adopts the principle of limited responsibility and the scope is merely limited to innocent persons who were wrongly sentenced to death. This narrow scope appears not to safeguard but violate the right to compensation as the requirements of 1982Constitution Article 41 and 1994SCL Article 2.

Secondly, according to 1994SCL Article 25, the main method of this compensation shall be the payment of damages, and the returning of property or restoring it to its original state. Both material and spiritual methods are highly regarded in compensating for wrongful death sentences, while the latter is more meaningful to the executed than the former.

Thirdly, the criterion threshold for compensation in cases involving execution of misjudged death sentences is very low, as indicated in 1994SCL Article 27. This tends not to fully protect the rights of the victim and effectively maintains the problematic social order. Furthermore, the criterion for death sentences with a suspension of execution and for unexecuted death sentences with immediate execution is determined according to the criterion for ordinary mistrials pursuant to 1994SCL Article 26.

Fourthly, another important characteristic is that the compensation committee of the PCs shall hear the application from applicants or the victim disobeying the disposal of organs under compensatory obligations. The legal instruments concerned are the 1994SCL Articles 20-24 and Provisional Regulations of the Supreme People's Court on Procedures for Compensation Committee's Hearing Compensation Cases. The committee shall specially designate persons to respectively investigate claimants for compensation, bodies under compensatory obligations, and reconsideration bodies. Then, the director of the committee shall report cases with clear facts and sufficient evidence to this committee for their hearing, on the principle that the minority is subordinate to the majority, and then the director will make the final decisions. This compact procedure involves secret hearing with strong administrative colour, lacks the effective participation of parties, and leads to the unfair trial of cases. Hence, this tends to go against the

requirements of justice and not to effectively promote the right to compensation in capital cases.

3.3 Judicial Practice

As the above theoretical analysis demonstrated, the nature of the Chinese legal system and the scope of the rights conferred on those implicated in capital crimes appear to create justifiable limits on the application of the death penalty. However, there is also vast scope for potentially unjust death sentences being granted. This joint effect tends to merely indicate the possibility of, rather than the practical application of, the death penalty. A complete picture on the Chinese policy on capital punishments cannot be ascertained until we examine the issue at a practical level. Hence, it is desirable to address the judicial practice in an attempt to assess whether China fully fulfils its human rights obligations.

Generally, studies on capital cases are helpful to objectively analyse a number of problems they present from a diverse range of perspectives. The following cases are major criminal cases that pertain to death sentences administered in recent years in China. They will be explored to illustrate the pros and cons of judicial practice in the field of capital punishment.

Case 1⁷⁶³

Tieling City IPC of Liaoning Province sentenced Liu Yong to death with deprivation of political rights for life and a fine of RMB 15,000,000 for joint punishment of crimes after the public hearing on 17th April 2002. This first-instance sentence was changed to the death penalty with a two-year suspension of execution and with deprivation of political rights for life by the HPC in the second instance on 11th August 2003. This resulted from the fact that his confession may have been obtained by the use of torture.

With the order of the president of the SPC, Xiao Yang, by laws, on 17th August, the SPC decided to retry this case on the basis of improper sentences in the second instance by the procedure of trial supervision of death sentences on 8th October 2003. The SPC convened the collegial bench for a public hearing from 18th

⁷⁶³ Sina 2-3

December with public prosecution by prosecutors, and the attendance of the defendant and his defender at Jinzhou City IPC of the Province. The SPC found out that criminal facts found in the first and second instance were authentic and the conviction was accurate, but the second-instance sentence improperly changed the precise first-instance one. It was decided that Liu Yong should be held responsible for all the crimes committed by the mafia-style organisation he organised and led, and should thus be sentenced to death with immediate execution for his crimes without legal or discretionary mitigating circumstances. On 22nd December, the SPC finally revised the final sentence by the HPC at 10:00 a.m. and Tieling City IPC executed him by means of injection at the funeral home of Jinzhou City at 11:35 a.m.

Case 2⁷⁶⁴

On 9th August 2001, Gao Pan went to his neighbour's home where he stole some items and then subsequently beat his neighbour to death. The focus of the legal debate in this case was whether Gao Pan had reached 18 years old. On 28th May 2002, the IPC of Baoding City, Hebei Province identified him to be 18 while committing the crimes and sentenced him to death for robbery. His appeal for identification of the age of his bones was refused by the HPC of Hebei Province that finally verdicted to return this appeal and maintain the original sentence, on 24th April 2003. Upon this news, his family immediately appealed to the People's Congress and the SPC for further identification of his age, while being notified that he was executed.⁷⁶⁵ This is against both domestic criminal law and customary international law. An analysis will follow later.

Case 3⁷⁶⁶

On 3rd January 1996, Qiaojia County Police in Zhaotong City, Yunnan Province, received a phone call reporting that a dead body had been found near a silk factory. After the investigation, the police found out that the deceased was a student in Yunnan Institute of Finance and Trade. She had been with her boyfriend, Sun Wangang, on the night when she was murdered, on the 2nd January. The bloodstain

⁷⁶⁴ Wang Jian, in *LL/2004/12*; South Net

⁷⁶⁵ Wang Jian, in *LL/2004/12*

⁷⁶⁶ Wang Yan, in *ZGDX/2004/4*

on his clothes and sheets were found to be of the same ‘type’ as his girlfriends, and his self-contradictory confession was basically consistent with the crime scene investigation and autopsy results. Thus, following initiation of public prosecution by the same-level PP, Zhaozhou City IPC sentenced him to death for intentional homicide.

After the defendant’s appeal, the Yuannan Province HPC made a written second-instance order of remanding this case to the first-instance court for a new trial. Following his second appeal, the HPC sentenced him to death with a suspension of execution on 12th November 1998. On 28th September 2003, the HPC started the retrial procedure following the provincial Procuratorate’s re-examination, upon appeal by the accused and his family. The HPC announced his innocence due to insufficient evidence in January 2004.

3.3.1 The applicable scope

3.3.1.1 The general scope

3.3.1.1.1 Basic understandings

In practice, the PCs universally observe this applicable scope of the death penalty and tend to sentence those who have committed ‘extremely serious crimes’ to death. Without having yet explained it in detail, diverse understandings among different judges or courts lead to distinct sentences on the same type of capital cases. This seems to violate the right of those facing the death penalty to be equal before tribunals and courts provided in ICCPR Article 14(1); and extend the applicable scope of the death penalty.

Most courts properly consider the case from both objective and subjective aspects in hearing cases, in order to cautiously apply the death penalty. For instance, the facts of leading a mafia-style organisation to commit serious crimes many times in Case 1 led to the defendant being punished by death. This appears to contribute to protecting the right to life against arbitrary deprivation provided in ICCPR Article 6(1).

3.3.1.1.1.2 Influencing Factors

Some courts, nonetheless, seem not to properly consider the above both aspects, which is unlikely to fully protect the right to life from arbitrary deprivation. This appears to be influenced by a number of primary factors.

3.3.1.1.1.2.1 'Strike Hard'

The first factor is the campaign of 'Strike Hard', which from 1983, was periodically launched by judicial bodies to emphasise giving heavier and quicker punishment to crack down on serious crimes.⁷⁶⁷ This tends to have a certain influence on the applicable scope of death sentences, which consists of both positive and negative aspects.

Specifically, the PCs tend to attach importance to strictly limiting death sentences and to cautiously keep death sentences within the general scope, even during the campaign. 'Strike Hard' requires courts to pay equal attention to both the efficiency and justice of death sentences, to correct misjudged cases and to ensure the legal applicable scope of the death penalty. It was reported that Beijing City HPCs revised 35 first-instance death sentences to those with a suspension of execution during the period of 'Strike Hard', from April 2001 till 2003.⁷⁶⁸ This reflects a positive element of the general scope.

The negative one is that giving heavier and quicker punishments has long been considered as a standard policy with the emphasis on the function of 'Strike Hard'. This appears to lead to extensive application of the death penalty. Specifically, some courts tend to 'give heavier punishment' to capital cases in ordinary procedures, regardless of mitigating circumstances. The convicts, who have attempted murder, impeached or exposed other accomplices in complicity cases, or who have actively given up ill-gotten gains after being discovered, still appear to be sentenced to death. Meanwhile, they are likely to overemphasise 'quicker punishment' as opposed to procedural laws when handling cases and aim for a higher number of guilty verdicts and executions, which tends to lead to misjudged cases. Moreover, some judicial bodies further put forward the policy of 'the criminals who do not have to be killed should be sentenced to death' and even

⁷⁶⁷ So far there have been 3 national campaigns of 'Strike Hard'. The first began from September of 1983, the second and third respectively started from April of 1996 and the end of 2000.

⁷⁶⁸ Qiu Wei, in *BW*(11/08/2003)

regulated the ration of executions as an important index for their review of outstanding achievements.⁷⁶⁹ This leads to the striking increase in the number of executions, directly deviating from the death penalty policy.

3.3.1.1.1.2.2. Indignation

Indignation is a discretionary circumstance in the sentencing of capital cases⁷⁷⁰ and tends to have a strong influence on the applicable scope of the death penalty in the judicial practice of China.

Such statements as ‘extreme indignation’ (*Minfen Jida*) and ‘no appeasement of indignation unless the execution’ (*Busha Buzuyi Ping Minfen*)⁷⁷¹ are not rare in judicial documents. Here this indignation means the resentment shown by the public, without vested interests, on the basis of a fair and wise assessment of the crimes⁷⁷². In Case 1, following the second-instance sentence, the public on the internet strongly requested sentencing Liu Yong to death with immediate execution, which seemed to contribute to the retrial of this case. This tends to be simple emotion incited by partially unfounded reports of the press, as the public did not understand the details of this case or the basic laws concerned. Hence, it is advisable to disregard such irrational matters as discretionary circumstances for the trial of capital cases.

3.3.1.1.1.2.3 Opinions of legal experts

Case 1 is the first case in which the defence lawyer tried to take advantage of legal expert opinions to influence criminal sentences, after the founding of the PRC. It is beneficial for judges to adopt the reasonable part of these opinions, but not to take them without discrimination.

Legal experts thought ‘the purpose of changing death sentences is to protect human rights’ due to the ‘confession potentially extorted by torture’ in the Case.⁷⁷³ In the light of their advice, the HPC court followed legal expert opinions to change the original sentence in the second instance, considering the defendant’s confession

⁷⁶⁹ *JCRB* 4

⁷⁷⁰ Xiong Hongwen, in *PPM*/2004

⁷⁷¹ *Ibid.*

⁷⁷² Liu Defa, in *JXTC*/2000/1

⁷⁷³ *PD* 2

to have been extorted by torture. This appears not to give full regard to the objective harm and subjective intention, ignoring the facts of the defendants' crimes and partially relying on authoritative opinions, to make sentences. These opinions really did work and influence the death sentence of the HPC, despite the fact that the SPC corrected it to affirm the original when it was reviewed.

3.3.1.2 The exclusive categories

In most cases, the death penalty tends not to be applied to juveniles, pregnant women and the insane in practice. Reportedly, there is no case on the inane to be applied capital punishment, but on juveniles and pregnant women.

Although no legislation leaves the possibility of sentencing juveniles to death in China, the boy under 18 years of age, Gao Pan, in Case 2, was sentenced to death and executed. It appears to be a particular instance, which results from improper judicial practice and not the relevant legislation on the prohibition of capital punishment from being imposed on juveniles. Accordingly, this does not appear to violate the relevant customary obligations on the prohibition of juveniles from being executed. Even if this case is only a rare phenomenon, however, it amounts to the violation of the relevant human right provided in ICCPR Article 6(5).

Since not all of pregnant women are prohibited from capital punishment under the relevant Chinese legislation, this leaves much room for the systematic violations of such human rights as detailed in ICCPR Article 6(5). The reported case of Ma Weihua⁷⁷⁴ is just one of examples that do not fall into the category of the women who are pregnant at the time of trial. Considering customary human rights obligations related to pregnant women, no pregnant women should be executed capital punishment and the above patterns of gross and flagrant violations of human rights breach such customary obligations.

3.3.2 Other Substantive Issues

⁷⁷⁴ Rednet 1

As some crimes are punishable by death according to both the 1979CL and 1997CL, they were subject to the death penalty under the 1979CL. The principle of non-retroactivity, provided in ICCPR Articles 6(2) and 15, is universally applicable in practice.

Since the founding of the PRC, the general pardon, in name of amnesty, has been for seven times applied to several kinds of criminals, including war criminals.⁷⁷⁵ The NPC Standing Committee made such decisions according to the advices of the Central Committee of CCP and the State Council in procedure.⁷⁷⁶ This is designed to correct wrongful death sentences and limit the execution. Hence, China's practice appears to conform to the principle of pardon provided in ICCPR Article 6(2) and (4).

3.3.3 Ordinary procedures for death sentences

3.3.3.1 *General*

As demonstrated, all the above Cases experienced the first-instance process without exception, followed by second-instance sentences, affirming or revising the original death sentences. These ordinary procedures will be examined in depth to reflect part of the situation on obligations performance.

3.3.3.2 The first instance

3.3.3.2.1 *Jurisdiction*

In the first instance, the above Cases were heard by tribunals established within the IPCs. These are the main first-instance Courts of capital cases at the lowest level, with both the HPCs and SPC at the upper level. Where necessary, Upper-level Courts may heard or designated lower-level ones to hear such cases. This trial jurisdiction is established pursuant to the 1996CPL and these tribunals are competent established by law. This is consistent with the requirement of ICCPR Article 14(1).

3.3.3.2.2 *Trial*

⁷⁷⁵ Wang Na, in *JJPSC/2002/2*

⁷⁷⁶ *Ibid.*

In the above Cases, every collegial panel should consist of judges and people's assessors with an odd total number, namely, 3 in the IPCs, or 3 to 7 in the HPCs or SPC when conducting the trial of first-instance cases⁷⁷⁷.

Following the preparation, Cases are universally held in a public hearing in the first instance. Although, according to the law, those involving State secrets, private affairs of individuals, or juveniles below 18 years of age shall not be heard in public, Gao Pan was tried in a public hearing as a juvenile, which goes against ICCPR Article 14(1). After cross-examination by both parties, this trial ends with the sentences of guilty or innocent announced by the collegial panel in public. This has no legal effect till the procedure for the approval of death sentences.

3.3.3.3 The second instance

3.3.3.3.1 *Initiation*

As the above cases indicated, the defendant's appeal successfully initiated the second instance of capital cases. Without this appeal or the protest of the PP, it is unlikely that this optional procedure would be started.

3.3.3.3.2 *Hearing scope*

During this procedure, the HPCs or SPC at the next higher level completely review the determined facts and the application of law in first-instance sentences, regardless of the scope of appeal or protest. This tends to contribute to finding and correcting mistakes in first-instance death sentences.

3.3.3.3.3 *Hearing Approach*

In the above Cases of second instance, the HPCs tend not to hold a public hearing in court, but read files, interrogate the defendant, and investigate the case, in contrast to 1996CPL Article 187.⁷⁷⁸ Some defenders have to present written opinions in their defence to second-instance courts, which appears not to adequately ensure the right to defence.⁷⁷⁹ This written approach seems merely to

⁷⁷⁷ 1996CPL Article 147

⁷⁷⁸ Zhou Daoyuan, in *RS/2004/8*

⁷⁷⁹ Ibid.

contribute to speeding up the period of concluding capital cases and reducing procedural costs. But without the presence of the defendant and cross-examination of the two parties, the trial would violate human rights detailed in ICCPR Article 14(3)(d) and (e). This tends not to ensure the just application of death sentences or safeguard the right to life, but instead increases misjudged cases.

The written examination was a primary approach of hearing capital cases in the second instance before 2006. It was discovered that the HPCs limited the public hearing rate of death sentence cases without a protest by the PPs to within 10% to 20%.⁷⁸⁰ Such cases mainly contain appealed cases in the circumstances where there are numerous defendants, where crimes have been committed many times, where confessions have been overthrown, where there have been many crimes or complicated evidence, or where questions are left open.⁷⁸¹

From 1st January 2006, however, the public hearing began to apply to all second-instance cases that were filed appeals for major facts and evidence as the basis of death sentences.⁷⁸² Since the second half of 2006, all HPCs have taken the approach of public hearing in trying any second-instance case involving death sentences.⁷⁸³ This appears to fully safeguard the right to a public hearing provided in ICCPR Article 14(1).

3.3.2.3.4 Results

After the hearing, death penalty cases are likely to be handled in one of the following manners. The first is to affirm the original judgement and conclude that it correctly determined the facts and properly applied the law, for example, in Case 2.

The second is to revise it and conclude that the law was incorrectly applied or the punishment was inappropriate, for instance, in Case 1. But courts tend not to change death sentences from the death penalty with a suspension of execution to that with immediate execution in cases of appeal by the side of the defendant.

The third is to return the case to the first-instance PC for retrial by a new collegial panel, for example, in Case 3, where the original judgement lacks unclear

⁷⁸⁰ Gao Mingxuan & Zhu Benxin, in *MLS/2004/4*

⁷⁸¹ Ibid.

⁷⁸² The SPC, in *NLR/2006/7/47*

⁷⁸³ Ibid.

facts or insufficient evidence. During the retrial, the PC is likely to sentence heavier punishments than those in the original judgement and even call for the death penalty with immediate execution. With less application of the principle of presumption of innocence, some death sentences without sufficient facts or evidence are likely to be returned time and again for retrial in the second instance.

3.3.4 Procedure for Review of Death Sentences

With the SPC transferring the power to review some death sentences with immediate execution, the 33 PCs review death sentences in China at present. They consist of the SPC, the HPCs in 31 provinces, autonomous regions, municipalities directly under the Central Government, and the Military Court of the PLA. This tends to lead to a series of problems and violations of human rights in practice, which can be demonstrated as follows.

Firstly, the HPCs tend to combine the procedure of first or second instance with that for review of death sentences,⁷⁸⁴ as the first-instance or second-instance PCs and PCs responsible for approving such sentences in long practice. Some written sentences, such as that of Case 2, ended with that ‘this sentence (or rule) is the approved death sentence (or rule)’ in accordance with the 1997NDS that ‘the SPC authorised the HPCs to review part of death sentences’.⁷⁸⁵ Even if all second-instance cases involving death sentences are heard in public at present, the procedure for review of death sentences is actually replaced with that for the second instance. Others, e.g., Cases 1 and 3, are likely to be reviewed by the HPCs in fact but with the SPC in name. This would miss out one chance to correct misjudged sentences and not ensure the right of all persons facing the death penalty to have sentences be reviewed by a higher tribunal.

Accordingly, the right to a fair trial provided in ICCPR Article 14(1) might be breached in the procedure for review of death sentences. Although the SPC only review and approve some and not all of death sentences, it was reported that the SPC modified and corrected 10% to 30% cases involving death sentences in the procedure for review of them.⁷⁸⁶ Even if the HPCs effectively safeguard the justice of death sentences with the universal application of public hearing approach, the

⁷⁸⁴ Wang Jian, in *LL/2004/12*

⁷⁸⁵ *Ibid.*

⁷⁸⁶ Hu Yunteng/1999/282

omission of any legal procedure violates the right to a hearing by a competent tribunal. This might increase the possibility of miscarriages of justice in death sentences.

Secondly, the transfer appears to lead to diverse standards in the application of the death penalty and breach the right to equality before the courts. The HPCs tend to have their own discretionary standards for death sentences within their territorial jurisdiction, or fall foul of such abnormal factors as unqualified judges or outside interference.⁷⁸⁷ Thus, the same crime is likely to be reviewed by the SPC for its occurrence in City A, while by the HPC in City B.

For example, drug-related criminals may be sentenced to death for crimes involving up to 200g or 300g of drugs in Hunan Province, which is far less than in such provinces as Guangxi and Fujian Provinces.⁷⁸⁸ The defendants under the diverse trial jurisdiction seem to have unequal treatment before procedural laws. Also, capital cases violating social order may be approved by provincial courts, while those involving economic crimes or State power are reviewed by the SPC. This appears to lead to the inequality of treatment of defendants who commit diverse kinds of crimes.⁷⁸⁹

Thirdly, this procedure is unable to offer a public hearing with both parties in attendance, but takes the approach of a secret reading by the SPC or HPCs. This appears to breach the right to a public hearing. Without transparency or openness, the PCs tend to dominate the whole course of affairs, and the defendant has to passively wait outside for the final results of verdicts. A lack of the effective participation of the defendants and of cross-examination of two parties tends to go against the minimum guarantees of procedural justice. These might increase the difficulty in discovering misjudged death sentences and the possibility of the arbitrary deprivation of the right to life. This does not appear to conform to the death penalty policy.

3.3.5 Procedure for Trial Supervision

3.3.5.1 Initiation

⁷⁸⁷ Zhang Yongjiang & Shu Hongshui, in *HLS/2005/1*

⁷⁸⁸ Zhou Daoluan, in *SF/2005/6/7-9*

⁷⁸⁹ Wang Jian, in *LL/2004/12*

In Case 1, the procedure for trial supervision was successfully initiated on the order of the president of the SPC. Defendants' lawyers may present a petition to a PC to initiate this procedure as parties to the cases. But no party, legal representative, or near relative presented a petition, nor did the SPP protest against this sentence, after the second-instance death sentence took effect.⁷⁹⁰ Since the HPC combined procedure for both the second instance and review of death sentences, the SPC had to rectify the second-instance death sentences through retrial rather than review of this case on the order of the president of the SPC. This appears to damage the stability of second-instance sentences and the trial authority of the HPC of Liaoning Province, however it contributes to the protection of the right to life against arbitrary deprivation.

In practice, a party or near relative of the defendants often takes the initiative in starting the procedure for trial supervision. Since juveniles below 18 years of age cannot be sentenced to death, there is no legal representative for defendants in this procedure of capital cases, unless defendants become persons with reduced capacity after legally effective death sentences. But some judicial bodies appear unwilling to accept the appeal, considering their own interests and possible State compensation,⁷⁹¹ and thus few appeals tend to be accepted in fact.⁷⁹²

Despite re-examining the appeal by the defendant and his family in Case 3, the PPs tend to disregard and seldom re-examine the party's appeals after accepting, much less protesting against legally effective death sentences.⁷⁹³ They also pay more attention to supervision over cases involving under-punishment, whilst at the same time paying less attention to overpunishment,⁷⁹⁴ which indicates the tendency of starting the retrial procedure against the defendants.⁷⁹⁵

Additionally, as indicated in Case 2, execution of the death sentence shall not be suspended when the near relative of the defendant appealed to initiate this procedure.

3.3.5.2 The trial

⁷⁹⁰ Huang Qi, in *YJXX/2004/4*

⁷⁹¹ Huang Jingping & Peng Fushun, in *MLS/2004/4*

⁷⁹² Ibid.

⁷⁹³ The SPP, in *ZRJG/2004/1*

⁷⁹⁴ Ibid.

⁷⁹⁵ Huang Jingping & Peng Fushun, in *MLS/2004/4*

In Case 1, the HPCs convened the collegial bench to hear such cases in public, which is an exceptional approach in the procedure for trial supervision. The general procedure involves a written examination of capital cases with a necessary investigation,⁷⁹⁶ which seems to seriously violate the right to a fair and public hearing.⁷⁹⁷ In case 3, during the trial, the City IPC did not change all members of the collegial bench in retrial of this case, upon the HPC's order of remanding for a new trial.⁷⁹⁸ This goes against 1996CPL Article 192 and the potential prejudication of original personnel handling the case might lead to an unfair hearing.⁷⁹⁹

The HPCs generally examine capital cases in a comprehensive way under this procedure, regardless of the scope of appeals or protests, which tends to favour the justice of death sentences. Nonetheless, these courts tend not to cancel death sentences that have been issued, considering their collegiate interests.⁸⁰⁰ This appears not to correct all misjudged death sentences that might be found.

3.3.6 The Judicial Situation of Procedural Rights

3.3.6.1 The rights inferred from legal obligations of judicial bodies

Since most rights inferred from the legal obligations of judicial bodies tend to guarantee a fair trial, all of these rights could be classified into two groups. These are the right to a fair trial and to humane treatment.

3.3.6.1.1 *The right to a fair trial*

As the above procedures demonstrated, China carries out a unique trial system to ensure the right to a fair trial in capital cases. This right mainly involves adherence to the following elements.

3.3.6.1.1.1 Equality before the Law

With the principle of equality before the law enshrined in 1982Constitution Article 33, 1997CL Article 4 and 1996CPL Article 6, the judicial bodies tend to strictly

⁷⁹⁶ Hu Changlong/2003/338

⁷⁹⁷ Gao Zhanchuan, in *JAEGPSLI*/2004/4

⁷⁹⁸ Wang Yan, in *ZGDX*/2004/4

⁷⁹⁹ Ibid.

⁸⁰⁰ Huang Jinping & Peng Fushun, in *MLS*/2004/4

implement the laws concerned. During litigation of capital cases, all participants fully exercise rights and coequally fulfil obligations under equal judicial protection and special judicial relief where necessary. The individuals who commit capital crimes are prosecuted under the criminal liability and sentenced to the same punishments for identical crimes under similar circumstances. This appears consistent with the right guarantee in ICCPR Article 14(1).

Nonetheless, violations of this principle still happen in practice. There are several points to this problem. During investigation, some police appear to refuse judicial bodies to take evidence from them, or reject their attendance in court and performance of the duty to witness. This seems to result from the strong influence of ideas inherited from the feudal past in China and lead to obvious inequality among individuals on the basis of differences in occupation or social status. Moreover, it is really difficult for defenders to collect evidence at this stage, which means there is a practical inequality between the accusing and defending party that should be equal in law.

In trial, the written examination approach lacks effective participation and cross-examination of parties, as indicated in the above Cases. The widespread application of this approach, in procedures for the second instance and review of death sentences, appears to aggravate the unequal situation between the accusing and defending party. Furthermore, the transfer of the power to approve death sentences to the HPCs seems to lead to diverse standards in the application of death penalty laws among persons accused of different capital crimes or in different provinces. Additionally, it is possible for persons who committed capital crimes not to be sentenced to death under the influence of outside factors.

In execution, many high officials and rich merchants appear to be executed in the relatively humane manner of injection, while most unknown common criminals by shooting. Among those Cases, the merchant prince, Liu Yong, was injected respectively in Case 1, while Gao Pan was shot as an ordinary criminal in Case 2. This shows unequal treatment in the method of execution, which is against the principle of equality.

3.3.6.1.1.2 The Principle of Nulla Poena Sine Lege

The judicial situation of this principle tends to be one of the factors that influence the quality of death sentences and the number of executions. In practice, judges tend to convict and punish criminals punishable by death strictly pursuant to the criminal laws concerned. This seems to present one side of the basic situation on practising the principle of *nulla poena sine lege* in China.

The other side involves several disadvantages and problems as follows. Under the current political systems, it still remains a serious problem that Party and government organisations interfere with the independent practice of the prosecutorial and judicial power.⁸⁰¹ The senior leadership paid more attention to the behaviours of some local officers,⁸⁰² while it is not rare for courts to convict persons for activities not punishable by laws or to conclude the verdict of not guilty even though the law stipulates them to be crimes.⁸⁰³ This problem may exist in capital cases. Moreover, not all judges are able to strictly explain laws in favour of the defendants.⁸⁰⁴ Hence, it is no wonder that such misjudged cases as Case 3 were not discovered or that innocent persons were not exonerated.

3.3.6.1.1.3 Presumption of Innocence

Without the principle of presumption of innocence explicitly established, there is no effective guarantee of this human right in practice. This appears to be indicated by the following observations.

Firstly, accused persons are referred to as criminal suspects before their conviction or discharge by the PC, instead of criminals, which tends to encourage judicial officials to rectify the prejudice against, and to safeguard the rights of, criminal suspects. Secondly, judges, prosecutors and investigators actively collect evidential materials that could be evidence only following the cross-examination of both parties in court. Thus, illegal evidence, such as the oral confession extorted by torture in Case 1, could not be used to prove the guilt or innocence. Furthermore, the PCs sentence criminals to death, as illustrated in the above Cases, but not in doubtful capital cases, to avoid misjudged sentences and wrongful executions. For

⁸⁰¹ He Bingsong/1997/66

⁸⁰² Cai Dingjian/1999/295

⁸⁰³ Cheng Guangzhong/2002/349

⁸⁰⁴ Ibid.

example, in Case 3, the inappropriate sentence was corrected to ensure judicial justice.

However, the legal duty of telling the truth⁸⁰⁵ and a lack of legal safeguards on excluding all unlawful evidence tend to deviate from the principle provided in ICCPR Article 14(2). This is likely to lead to two primary problems.

The first is the collection of evidence by unlawful means. With the poor condition of investigation techniques, police seem to depend on suspects' confession too much. The legal obligation to tell the truth appears to facilitate their undue dependence on such oral confession gathered by any means, including such unlawful means as torture. For example, some innocent defendants charged with capital crimes are likely to be sentenced to death with a two-year suspension of execution, on the basis of unclear facts or insufficient evidence. Misjudged cases aroused the intense response and broad concern across all spectrum of the Chinese society.

The second problem is the tendency to give heavy punishments to the suspects, regardless of their innocence or guilt. In recent years, the media have reported more cases of courts sentencing the innocent to death,⁸⁰⁶ such as Case 3, and '[T]he First Case of China Lawyers' Tax Evasion'⁸⁰⁷. In fact, the innocent find it impossible to tell their own side of the story, and guilty suspects are unwilling to present evidence and facts for fear of incriminating themselves, but offer untrue oral confessions or overthrow the true one. This tends to be regarded as a bad attitude which leads to heavy punishments and the expansive application of death sentences.

3.3.6.1.1.4. An Independent and Impartial Trial

The explicit provisions on an independent and impartial trial in the Chinese legislation appear not to be guaranteed in practice. There seems no independent or impartial trial in criminal proceedings, especially in capital punishment cases, for several reasons.

Firstly, the system of collective trial inside judicial bodies tends to strengthen the control of judges by means of decision-making by a collegial benches or trial

⁸⁰⁵ 1996CPL Article 93

⁸⁰⁶ Li Junming & Song Yanhui, in *JHRTU*/2004/4

⁸⁰⁷ Zhao Xiaoqiu, in *LL*/2003/11

committee. This is designed to draw on the wisdom of the masses and reduce misjudged cases, while presiding judges cannot make sentences impartially, nor can the members of trial committee attend trials.⁸⁰⁸ This is against justice.

Secondly, lower courts tend to report to upper ones and ask for instructions with respect to both legal and factual problems, and upper courts investigate into misjudged cases sentenced by lower courts. This appears to indicate that lower courts are under the guidance, rather than the supervision, of upper ones in decision-making. Similarly, under the legal systems of the European Community, a court or tribunal of a Member State may send issues to the Court of Justice for clarification of law. As Consolidated Version of the Treaty Establishing the European Community Article 234 stated, the court or tribunal of a Member State shall bring the matter, raised in a case pending before that court or tribunal 'against whose decisions there is no judicial remedy under national law', before the Court of Justice for 'the interpretation of this Treaty'.

Thirdly, the good training of judges themselves contributes to an impartial trial. Not all Chinese judges have good training. It seems difficult for unqualified judges to try capital cases without the help of colleagues, leaders or upper courts. This might lead to the partiality of judges in hearing cases and making judgements.

Fourthly, judicial bodies have long been regarded as political tools⁸⁰⁹ under the absolute guidance of party committees in judicial work since 1949, which leads to a lack of due respect for laws, courts and for independent justice.⁸¹⁰ The leadership of CCP abolished the system of party committees examining and approving particular cases in public proclamation in the early 1980s. Yet in fact the committee of the same or upper level still directly intervenes in sentences of momentous or sensitive cases, and main cadres appear to oppugn concrete trials.⁸¹¹ With the mainstream idea of judicial independence in political circles,⁸¹² politics and law committees inside party committees of all levels, mainly discuss and submit some great or momentous cases to party committee of the appropriate level

⁸⁰⁸ He Weifang/1998/56-57

⁸⁰⁹ Law-lib 2

⁸¹⁰ Ibid.

⁸¹¹ ZFS 2

⁸¹² Ibid.

for decision-making. This might have a negative influence on an independent and impartial trial.

Fifthly, the local People's Congress tends to select judicial personnel from local State bodies, which is likely to lead to a mixture of qualified and unqualified judges, or even, in some areas, an entirely poor collection of judicial personnel. The People's Congress also has the power to supervise all stages of judicial proceedings. These would influence the independence of courts. Since legislative bodies represent public opinions that are not always consistent with judicial justice, they might change the impartial position of judges to make unjust judgements.

3.3.6.1.1.5. A Public Trial

The SPC required public hearings in the second instance of all capital cases from July 2006 pursuant to the 2005NPH.⁸¹³ The second-instance courts are legally obliged to hear all capital cases in public, whereas in practice not all capital cases are held in a public hearing in the second instance. In the above Cases which were heard before 2006, there was no public trial in procedures for the second instance or for review of death sentences. It follows that not all persons facing the death penalty are allowed to give their evidence because in China close trials mean that no evidence can be adduced. These obviously breach the relevant procedural law and might lead to bad decisions.

Among all the Cases above, the public hearing is the universal approach that courts use in trying cases, with the written examination as an exception in the first instance. This appears to contribute to the broad participation of both sides in cross-examining and debating pertinent facts or evidence. In the second instance, judges mainly read files, interrogate the defendant, and hear the opinions of defenders, when they handle most capital cases without the participation of the accusing party or cross-examination of both parties.⁸¹⁴ The procedure for review of death sentences follows the same approach. This appears to leave much room for the PCs to prosecute, command, and decide what counts as evidence of guilt or of the seriousness of crimes.⁸¹⁵

⁸¹³ The SPC, in *NLR/2006/7/47*

⁸¹⁴ Zhao Heli & Zhou Shaohua, in *MLS/2004/4*

⁸¹⁵ *Ibid.*

Additionally, courts appear to merely examine evidence recognised in the first instance to determine whether crimes are extremely serious. This might hamper the effort to find sufficient evidence, thus, not ensuring the justice of death sentences.

3.3.6.1.1.6 On the Principle of *Ne Bis In Idem*

Although there is no explicit provision on the principle of *ne bis in idem*, the judicial practice of China tends to conform to this principle. From the above Cases, the procedure for trial supervision would not go against the above principle, as a permissible exceptional circumstance, but might lead to more disadvantages for those facing the death penalty.

Case 1 was brought to retrial on the same crimes and this changed the second-instance sentence from death sentences with a suspension of execution to those with immediate execution. This increases the original punishments of the defendants and put them at a greater disadvantage.

3.3.6.1.1.7 Degree of Proof

Owing to the significance and irreversibility of death sentences, and the ineluctability of misjudged cases, it is necessary for States to establish the strictest and most incontestable system of proof possible. From Case 3, several serious problems in practice will be addressed.

Firstly, the PCs tend to impose conviction on capital cases with evidence reaching an apodeictic degree of 97% or 98%.⁸¹⁶ As indicated in the Conference on National Work of Social Order and Public Security in 2001, the basic principle of 'Strike Hard' refers to both clarity of basic facts and reliability and sufficiency of basic evidence for handling cases. This differs from clear facts and reliable and sufficient evidence in 1996CPL Article 162 and decreases requirements of evidence. Accordingly, considering many doubtful points and incompatible evidence, the PCs imposes the death penalty with a suspension of execution, which really leads to more wrongful death sentences and the expanding scope of capital punishment.

⁸¹⁶ Liu Renwen, in Zhao Bingzhi/2004

Secondly, relevant evidence without cross-examination and even illegal evidence tend to be adopted as the evidence that could be used to determine a case. As investigations have shown, there was no exclusion of unlawful evidence in the PCs, PPs and Police of Beijing City, Hainan Province, Henan Province, Hebei Province, Shanxi Province and Jilin Province.⁸¹⁷

Apart from extortion of evidence by torture in Case 1, a policeman signed the written statement on behalf of Sun Wangang, in Case 3, and the personnel of the City PP failed to arraign him.⁸¹⁸ Such illegal confessions should not be adopted as important evidence when it comes to the prosecution or accusation of crimes,⁸¹⁹ and has in fact lead to incorrect death sentences.

Further problems are brought to light by the *Case Zhao* involving intentional homicide⁸²⁰ that was tried in a public hearing open to national view and emulation.⁸²¹ The record of an inquest or examination on the scene was signed or sealed neither by those involved nor by the eyewitnesses. Only one expert conducted the handprint or footprint identification which is less than the legal number of experts required by appraisal certificate. Yet the PC announced that the above evidence tallied with the oral confession of the defendant, and the defender's pointing out of evidence deficiencies failed to be used in revealing the verdict, after the cross-examination. This case shows the improper use of illegal evidence to decide a verdict.

Another mistake is not to apply the death penalty where not all details of the facts are clear or where both direct and indirect forms of evidence are available.⁸²² This is likely to affect the conviction's being reached in the appropriate time because not all facts or forms of evidence are available in all cases. Actually, clear facts and evidence on constitutive elements of crimes are necessary and sufficient for the legal standards for conviction, regardless of whether or not all the facts and evidence have been covered.

3.3.6.1.2 *Humane treatment*

⁸¹⁷ Yang Yuguan, in *Cheng Guangzhong*/2002/260

⁸¹⁸ Wang Yan, in *ZGDX*/2004/4

⁸¹⁹ Ibid.

⁸²⁰ Li Yan, in *CLJ*/2000/7/70-71

⁸²¹ Ibid.

⁸²² Zhu Juyin, in *JWPSCC*/2004/3

In judicial practice, China has achieved great progress in the humane treatment of capital criminals. The injection means has been adopted as a humane execution method.⁸²³ It is regarded as suitable for less executed persons, the elder and those with walking difficulty in China.⁸²⁴ Moreover, capital criminals can now meet their relatives before dying with the first example being in Beijing on 17th September 2003, pursuant to 50 measures of the HPC of Beijing⁸²⁵.

However, a series of problems in violation of humane treatment remain to be resolved at various stages of the process in capital cases.

During investigation, some judicial bodies are likely to take compulsory measures excessively, collect evidence by unlawful means, or maltreat prisoners, such as in Cases 1 and 3. This inhumane treatment tends to lead to misjudged death sentences and even incidents involving criminal suspects' injury or death, which are frequently reported in newspapers.

In execution, there are still serious problems, some of which could be illustrated from an article entitled 'Experience in Enforcement of Death Sentences' by a military police soldier.

Firstly, the author states that 13 prisoners sentenced to death had been executed on the same day. This tends to intensify deterrence and maintain social order⁸²⁶, especially, when such executions are on the eve of important festivals.⁸²⁷ This is likely to violate the term of 7 days in 1996CPL Article 211, which requires the lower PC 'cause the sentence to be executed within seven days' after receiving an execution order from the SPC.

Secondly, the executed were sentenced at a public sentencing rally with journalists from Xi'an TV station and PCs News, and the public in attendance. This form of trial appears to consider the executed essentially as a tool and seriously infringes their human dignity.

Thirdly, Captain Zhou Rong asked the executed to kneel down, put out a chest, and raise their head without looking around, so as to avoid more pain in execution that was necessary. Team members responsible for the execution fastened their

⁸²³ Chen Lie & Zhang Leping, in *QB*(11/07/1997)

⁸²⁴ Zhuang Xujun, in *JSUST*/2005/4

⁸²⁵ Xinhuanet 18

⁸²⁶ *JCRB* 6

⁸²⁷ e.g., New Year's Day, Chinese New Year, National Day and even World Children's Day

trousers around their ankles to avoid encopresis or irretention. This may be done out of humanitarianism but it still humiliates the person.

Fourthly, an old person whose daughter was killed by a criminal on the vehicle gesticulated at him and shouted abuses at passing criminals regardless of others' dissuasion.⁸²⁸ A soldier scornfully taunted one of the executed. Such words and deeds are a clear sign of poor treatment and a lack of respect for the prisoners, an attitude which has been repeatedly reproached by the SPC, SPP and MOPS.

Apart from the above problems indicated in the article, males facing the death penalty tend to be shaved, without choice, in detention houses or prisons.⁸²⁹ Regardless of their guilt or innocence, they are deemed to be convicts simply by the sign of their close shave, which appears to be disgraceful and humiliating treatment for persons facing the death penalty. Additionally, many local courts are accustomed to pronouncing the sentence of death penalty twice, both in prison and at the adjudication meeting during the execution of death sentences. This seems to obviously increase the defendant's distress and go against their right to humane treatment.

After the execution, cases of the illegal transplant of organs have appeared in recent years. In supervising over execution of death sentences by shooting, procuratorial bodies found that some courts sold convicts' organs, including kidney and cornea, to hospitals after they had been executed.⁸³⁰ As organ trafficking is prohibited and consent is required for one of someone's organs,⁸³¹ enforcement bodies seem to make an oral agreement with medical treatment and research institutions to transplant the organs of the executed. The personnel of medical affairs have immediately transplanted organs from the newly executed to patients.

Thus, both courts and hospitals benefit from this practice but only after the moral violation of not asking for the consent of the executed or their close relatives. The economic advantages to be gained are counter-influence on the achievement of justice in hearing such cases. With the agreement of selling organs to hospitals, courts are likely to prefer death sentences with immediate execution to those with a suspension of execution or other punishments. This tends to lead to both more

⁸²⁸ Yue Zhaohui, in *JS*/1996/12

⁸²⁹ Xu Lan, in *SGA*/2004/2

⁸³⁰ Chen Qi & Luo Lu, in *JCSJ*/2003/5/70

⁸³¹ Yan Shide & Dong Kaiwei, in *LC*(23/09/2003)

executions and judicial injustice in death sentences,⁸³² deviating from the policy of strict limits on the death penalty. It also goes against the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment provided in the ICCPR, CAT and CRC.

3.3.6.2 Rights available to the accused party

3.3.6.2.1 The rights to defence and legal aid

The rights to defence and legal aid are important ones in presenting the practical situation of the procedural rights of persons facing the death penalty when compared to those of the accusing party. The rights have been improved to reinforce the defence function and promote the development of the criminal defence in practice since the implementation of the 1996CPL. Yet, these do not appear to be guaranteed at all stages of judicial proceedings. It is also difficult to fully exercise them at the limited stages in capital cases and thus to effectively safeguard the legal rights and interests of persons facing the death penalty to a certain degree.

Firstly, some investigators appear not to inform criminal suspects of the right to appoint lawyers after the investigative bodies' first interrogation or compulsory measure, and thus many suspects have no idea about it. Without explicit legal procedures for informing people of such rights, it has been shown that investigators did not inform criminal suspects of the procedural rights concerned during interrogation in over 85% cases put on record.⁸³³

Secondly, defence lawyers cannot read all file records during examination for prosecution and have to resort to the PC for evidence materials transferred by the PP. These materials tend merely to testify to the guilt of the accused more than their innocence or the pettiness of crimes and are often not even offered by the PP due to its consideration that some of the main evidence is unimportant. Hence, it seems that defenders cannot have a good preparation for defence in the court session, which appears to limit the practical application of the right to defence.

Thirdly, with limitations on number or time of meetings, it seems to be difficult for defenders to meet criminal suspects in custody. The investigators tend

⁸³² Hu Changlong/2003/309-311

⁸³³ Shi Jian & Nie Yonggang, in *SSJCS/2005/1*

to plead various reasons to hamper or postpone such meetings, including the involvement of State secrets, the personnel handling a case being out and the need for approval by officials in charge.⁸³⁴ It seems that lawyers have to wait a long time for arrangements by investigative bodies. Even with their permission, lawyers are limited to meeting the accused once for less than 30 minutes⁸³⁵ or twice from 15 to 45 minutes each⁸³⁶ before a trial.

In every phase of the process, investigators attend such meetings without exception.⁸³⁷ During the meeting in investigation, they tend to arbitrarily intervene in talking between lawyers and criminal suspects, through limiting the topics discussed, directly asking questions, or recording the session by secret kinescoping or supervision.⁸³⁸ Even at later stages, lawyers and defendants have to talk by phone with windows between them, and the defendant cannot clearly see materials presented by lawyers or sign interview notes, not to mention discuss secret information.⁸³⁹

This appears to prevent lawyers from obtaining sufficient case details to provide defendants with high-quality defence. This is likely to hamper the full practice of the right to defence.

Fourthly, defenders cannot investigate cases to obtain evidence for the defence in investigation. With the permission of the judicial bodies concerned and the consent of the victim or witnesses they can collect information from them. It is difficult for defenders' lawyers to successfully collect evidence or materials in practice.

Moreover, defence lawyers appear to be at a risk of being accused of criminal misconduct. It frequently happens in such cases that lawyers are suspected of crimes such as the defender and agent ad litem's destroying evidence, falsifying evidence, or interfering with witnesses. Both the 1996CPL and 1997CL began to be implemented in 1997, which was deemed to be a disastrous year for Chinese lawyers.⁸⁴⁰ According to statistics by the All-China Lawyers Association, more

⁸³⁴ Liu Meixiang, in *JXU*/2005/1; Yang Man, in *JWMMI*/2004/2

⁸³⁵ Li Yimin & Yang Yongzhi, in *HLS*/2005/1

⁸³⁶ Li Lina & Yi Fangdun, in *JAEGPSLI*/2004/4

⁸³⁷ Yang Man, in *JWMMI*/2004/2

⁸³⁸ Li Lina & Yi Fangdun, in *JAEGPSLI*/2004/4

⁸³⁹ Yang Man, in *JWMMI*/2004/2

⁸⁴⁰ Wang Li/2002/2

than 400 defense attorneys were accused of these crimes and detained in the period from 2nd January 1997 to 2003,⁸⁴¹ including one of the ‘Ten Excellent Lawyers’ Zhang Jianzhong⁸⁴². Some of them were likely to have been improperly accused due to the abuse of authority by judicial bodies,⁸⁴³ such as the Case of Liu Zhengqing in Yueyang City, Hunan Province, which led to the cessation of criminal defence work in the whole city as a protest.⁸⁴⁴

The above obstacles are likely to lead to sudden death sentences in the first instance, no actual function of the second-instance procedure, or no acceptance of justified defence opinions.⁸⁴⁵ This restricts the effective practice of this right in the first and second instances of death sentences, not to mention the procedure for review of death sentences.

Additionally, the system of legal aid merely exists in the trial phase, instead of for the whole course. The right to legal aid would not be effectively safeguarded. With the recent establishment of this system and backward conditions in some parts of China, the fund dedicated to it appears to be very meagre. Thus, the system tends not, in practice, far from meeting social needs.

3.3.6.2.2 *The right to call and examine witnesses*

In practice, the PCs hear all capital cases that should be prosecuted and supervised by the PPs. It is essential to ensure the right of those facing the death penalty to call, obtain the attendance of, and examine witnesses, in order to keep imbalance between the accusing and defending parties. However, the PPs are likely to optionally prosecute the criminal responsibility of witnesses and the PCs might have a negative attitude towards the testimony of the defendants.⁸⁴⁶ This would lead to the serious imbalance between them and actually not to effectively protect the right to call and examine witnesses.

Moreover, a lack of legal safeguards or protective measures for preventing attacks against, or interference with witnesses, appears to lead to a low

⁸⁴¹ BDHRL 5

⁸⁴² China Court 1

⁸⁴³ Li Yimin & Yang Yongzhi, in *HLS/2005/1*

⁸⁴⁴ Wang Li/2002/13

⁸⁴⁵ Zhang Wenjing, in *JC/2004*

⁸⁴⁶ Zhou Qing, in *JFP/2004/3*

participation of them in court.⁸⁴⁷ This might not fully safeguard the above right, but aggravate the imbalance between both parties in criminal cases. This also appears to lead to the high rate of conviction in capital cases, more death sentences and even executions.

3.3.6.3 Rights to eliminate the effect of misjudged sentences

Among these rights, primary ones include both the right of appeal and that of criminal compensation. This will be examined in detail one by one.

3.3.6.3.1 *The right of appeal*

As demonstrated in the above Cases, China tends to fully safeguard the legal right of appeal to examine legally improper death sentences in the procedure of the second instance or legally effective ones in the procedure of trial supervision. In practice, 99% of defendants exercise this right to initiate procedures for the second instance,⁸⁴⁸ with the principle that no appeal will result in additional punishment. This tends to contribute to the effective protection of this right and promoting the justice of death sentences.

Yet, in most circumstance, it seems to be difficult for prisoners to successfully exercise this right in the proper period following the sentence for several reasons. The limits on meeting between defence lawyers and the defendants appear to obstruct lawyers in helping defendants serving death sentences with a suspension of execution to actually exercise this right. The policy of additional punishment in cases of failed appeals from trial supervision cases prevents persons facing the death penalty from making an appeal. This is obviously a wrong rule.

Moreover, the short period for appeal seems to lead to extremely rushed execution of death sentences. As indicated in Case 1, the SPC sentenced Liu Yong to death at 10:00 a.m. according to procedure for the second instance and immediately executed at 11:35 am on the same day. In general, criminals sentenced to death tend to undergo a range of extreme feelings after receiving death sentences, and thus are likely to miss the legal term for the exercise of this right due to

⁸⁴⁷ ZFS 1

⁸⁴⁸ Wang Jian, in LL/2004/12

extreme anxiety and fear of death. Even if their family exercised this right immediately after final death sentences, they are likely to be hastily executed, for example, Case 2. Hence, it is useful to extend the term to make the appeal meaningful and fully safeguard the right to appeal. There would be much chance to correct misjudged death sentences and adequately safeguard the rights of those facing the death penalty.

3.3.6.3.2 *The right of criminal compensation*

In practice, China tends to strictly carry out criminal compensation in capital cases according to laws. Meanwhile, there are several serious problems remain to be resolved.

The hearing of the compensation committee seems to be secret, and applicants for compensation have no right to a lawyer's help, appeal or any effective participation in this process. Especially, a functional department inside the PC hears misjudged cases to decide whether or not the PC itself undertakes the responsibility for compensation. These appear to leave much possibility of not fully safeguarding the right to criminal compensation, especially in capital punishment cases.

3.4 Conclusion

Although China officially maintains the policy of strict limits on and cautious application of capital punishment, Chinese criminal systems do not appear to fully protect the right to life from being arbitrarily deprived in law or practice. There is an obvious distinction between the policy and China's legal and judicial practices concerning capital punishment.

In Chinese legislation, there is no explicit provision on presumption of innocence 'until proved guilty according to law' provided for in ICCPR Article 14(2). Despite the fact that there is no conviction without a trial by the PC⁸⁴⁹, the legal duty to tell the truth⁸⁵⁰ and no exclusion of any evidence obtained by unlawful means, e.g., torture, tend to deviate from the principle of presumption of innocence

⁸⁴⁹ 1996CPL Article 12

⁸⁵⁰ 1996CPL Article 48

during investigation. This appears to leave much room for compelling any person facing the death penalty to ‘testify against himself or to confess guilt’ in violation of ICCPR Article 14(3)(g).

Moreover, lawyers are unable to be present at the initial police interrogation during investigation. Together with other legal restrictions on practising lawyers, the person facing the death penalty might not be entitled with the right ‘to communicate with counsel of his own choosing’ provided in ICCPR Article 14(3)(b); or to defend himself ‘through legal assistance of his own choosing’ in ICCPR Article 14(3)(d). These do not appear to meet minimum guarantees in the determination of criminal charges specified in ICCPR Article 14(3) or fair trial required by ICCPR Article 14.

Due to the severe lack of legal safeguards and above-mentioned breaches of human rights, the practice would not guarantee due process. Under the current political and judicial systems, Party and government organisations may interfere with criminal trials and there might have political pressure to pass death sentences. Furthermore, the transference of the power to review some death sentences from the SPC to the HPCs is actually no final approval of death sentences. This appears to violate all of the relevant human rights provided in ICCPR Article 14(1); 14(3)(d); 14(3)(e); and 14(5). The exclusive approach of written examination in the procedure for review of death sentences also breaches the right to a public hearing provided in ICCPR Article 14(1). These lead to more violations of human rights and even arbitrary or unlawful deprivation of life in capital punishment cases, under customary laws.

In execution of death sentences, public rallies and the parading of prisoners sentenced to death might constitute inhuman or degrading treatment. Although China prohibits organ transplants by unlawful means only, a lack of meaningful or voluntary consent of the executed or his relatives before lawful organ transplants would amount to cruel or inhuman treatment. Torture also might be a means by which judicial bodies take unlawful evidence from those facing the death penalty; or manage prison at Reform-through-labour institutions in the implementation of death sentences with a suspension of execution, as indicated in Chapter V. This appears to breach the fundamental freedom from torture, cruel, inhuman or

degrading treatment provided in the CAT or the CRC where children suffer from such treatment.

At the substantive level, most of legal provisions concerning capital punishment in China appear to conform to the ICCPR, except for the limited scope of pregnant women excluded from execution of capital punishment. Although the general applicable scope- 'extremely serious crimes' seems consistent with ICCPR Article 6(2), it extensively covers crimes of endangering the State security; of endangering public security; of undermining the Socialist economic order; of infringing upon the rights of the person and the democratic rights of citizens; of property violation; of obstructing the administration of public order; of endangering interests of national defence; of embezzlement and bribery; of dereliction of duty; and crimes contrary to duties committed by servicemen.

The 1997CL exempts persons below 18 years old and the insane from the imposition of capital punishment, not to mention its execution, which conforms to China's customary obligations. Not all pregnant women, but only those 'at the trial' are excluded from capital punishment, which is different from pregnant women exempted from only the execution of capital punishment in ICCPR Article 6(5) and the relevant customary obligations. Apart from these, the 1997CL includes the right to commutation, to amnesty; and the principles of non-retroactivity and non-reintroduction.

Under the influence of 'Strike Hard', the applicable scope of capital punishment tends to be extensively applied on the basis of a broad coverage of 'extremely serious crimes'. As a result, those facing the death penalty may be convicted or executed on this basis and capital punishment may be argued to be on the increase. 'Strike Hard' campaign might also mean that those who do not deserve to die may have to be sentenced to death or executed. Moreover, judicial bodies tend to pay more attention to substantive justice than procedural justice,⁸⁵¹ which leaves much room for the expedience rather than rigour of conviction. This might lead to the extensive and even arbitrary imposition and execution of capital punishment. The scope of such executions may include the disabled, foreign nationals, the residents of Hong Kong and Macao, and those involving extradition

⁸⁵¹ Wang Yan, in *ZGDX*/2004/4/56-61

issues, which may be executed by the 1997CL; and child offenders that should not be sentenced to death, pregnant women that should not be executed under the 1997CL or China's customary obligations.

Therefore, the practice on capital punishment tends to deviate from China's official policy and remain a distinction from the relevant human rights obligations. China appears to breach its customary obligation on pregnant women by patterns of gross and flagrant violations of human rights related; its treaty obligations in the CAT and even the CRC by particular instances. Among the requirements of the ICCPR contained in the 1996CPL or 1997CL, however, most of the substantive provisions concerning capital punishment appear to conform to the ICCPR.

Chapter IV FORCED LABOUR AND INTERNATIONAL HUMAN RIGHTS LAW

4.1 GENERAL

Forced or compulsory labour continues to exist in this modern age and has the effect of violating both civil and socio-economic rights, even amounting to slavery and servitude. The prohibition of such labour has been recognised and codified into international human rights law. Various international and regional instruments have been adopted to protect the freedom of labour and also to reform its systems by the introduction of compulsory provisions which State parties should adhere to.

The CLN⁸⁵² expressly prohibits the slave trade⁸⁵³ and requires 'fair and humane conditions of labour'⁸⁵⁴. Without reference to forced labour, the requirement of 'fair and humane conditions of labour' implies to prevent any labour against such conditions, including forced labour. The Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926,⁸⁵⁵ adopted by the LN in 1926 and came into effect in 1927, is mandated to both suppress slave trade⁸⁵⁶ and prohibit forced labour.⁸⁵⁷ It has been described as 'the first true international human rights law treaty'.⁸⁵⁸

The UN, European Commission, OAS and OAU have over a long period actively engaged in the process of standard setting in the prevention of forced labour. The UDHR in 1948, ADRDM adopted by the OAS in 1948⁸⁵⁹, and ACHPR adopted by the OAU in 1981 and brought into force in 1986,⁸⁶⁰ all prohibit forced labour. The ICESCR adopted by the GA in 1966 and in force from 1976,⁸⁶¹ and the European Social Charter⁸⁶² adopted by the Council of Europe in 1961, entered into force in 1965 and revised in 1996, guarantee the right to work, rights concerning pay and conditions of work, rest and leisure, of workers. This equally applies to forced labourers and seems to contribute to prohibition of forced labour. The

⁸⁵² Evans1/2003/1-7

⁸⁵³ CLN Article 22

⁸⁵⁴ CLN Article 23(a)

⁸⁵⁵ 60/LNTS/253

⁸⁵⁶ SSFL Article 4

⁸⁵⁷ SSFL Article 5; Lassen, in NJIL1998/57/198

⁸⁵⁸ Sieghart/1983/233/[18.4.6]

⁸⁵⁹ OAS/RES/XXX

⁸⁶⁰ 21/ILM/58/1982

⁸⁶¹ 993/UNT/S3

⁸⁶² ETS/163

SCA,⁸⁶³ in force from 1957, adopted the approach of simply referring to the SSFL and other instruments on forced or compulsory labour in the Preamble. Differently, the ICCPR adopted in 1966, ECHR in 1953 and ACHR in 1978 expressly prohibit forced labour and list the relevant exceptions in their provisions. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁸⁶⁴ adopted in 1990 and entered into force in 2003 also explicitly prohibits such labour with certain exceptions, but this treaty only applies to migrant workers and members of their families.

Since the establishment of the International Labour Organization in 1919, a series of special instruments has contributed to the development of international human rights instruments in the field of forced labour. The Convention concerning Forced or Compulsory Labour,⁸⁶⁵ which came into force in 1932, defined the forced labour that should be prohibited, whilst also including the permissible forms of compulsory work or service as exceptions and detailing both the conditions for and restrictions on the imposition and performance of such labour. The Abolition of Forced Labour Convention,⁸⁶⁶ in force from 1959, also listed the limits on its imposition. Such details 'have served as a model for most general human rights treaties'⁸⁶⁷ on forced labour. Furthermore, the Equal Remuneration Convention,⁸⁶⁸ entering into force in 1953, and Remuneration Policy Convention,⁸⁶⁹ coming into force in 1965, specify a range of socio-economic rights concerning work. These rights in work are equally applicable to those performing forced labour.

Nonetheless, the above-mentioned instruments appear not to cover all the relevant obligations on State parties. The silence on some points does not mean that States may 'compel old, sick women to work 70 hours per week for several months without compensation' 'in the case of a natural calamity'.⁸⁷⁰ Forced labour must meet certain minimum legal standards on labour and social welfare and must not violate the prohibition of discrimination.⁸⁷¹ Additionally, torture, cruel, inhuman or

⁸⁶³ 226/UNTS/3

⁸⁶⁴ UN Doc.A/RES/45/158, annex

⁸⁶⁵ 39/UNTS/55

⁸⁶⁶ 320/UNTS/291

⁸⁶⁷ Drzewicki, in Eide, Krause, Rosas/2001/230; Sieghart/1983/230-233

⁸⁶⁸ 165/UNTS/303

⁸⁶⁹ 569/UNTS/65

⁸⁷⁰ Nowak/1993/157/[35]

⁸⁷¹ Ibid.

degrading treatment should be prohibited from happening during the performance of such labour.

These general considerations appear to suffice to review the overall development of the major instruments on the prohibition of forced labour. The following discussion will explore further the requirements of forced labour in international law, the related treaty obligations that have been imposed on China and potential customary international law duties.

4.2 The ICCPR

With the signing of the ICCPR, China appears not to defeat its object and purpose, whereas it has not yet imposed on China treaty obligations.⁸⁷² Only after ratifying the ICCPR, China has to undertake more international human rights obligations, which will be explained in depth as follows.

4.2.1 The scope of prohibition of forced labour

Derived from ILO29 Article 2, ICCPR Article 8(3) stipulates the prohibition of forced or compulsory labour and imposes the absolute and immediate obligation on State parties to prevent it. This also allows for a few exceptions to the general prohibition. The specific scope of prohibition entails the following elements.

4.2.1.1 General scope

ICCPR Article 8(3)(a) states that '[N]o one shall be required to perform forced or compulsory labour'. Generally, it obliges States to prohibit all forms of forced or compulsory labour beyond slavery and servitude respectively in Article 8(1) and (2). While 'the borders between slavery and servitude and other forms of forced or compulsory labour are not hard and fast'⁸⁷³, it is still essential to distinguish them from one another in order to precisely interpret relevant obligations on forced labour.

'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised', as stipulated in SSFL

⁸⁷² See 2.2

⁸⁷³ Nowak/1993/146/[8]

Article 1(1). This means the exploitation of human beings by human beings with immunity on the basis of ownership.⁸⁷⁴ ‘Servitude’ occurs where one human being actually has legal powers over another to effectively exercise other forms of economic exploitation or dominance over another, without the protection of ownership.⁸⁷⁵ This appears to include all forms of slavery-like practices beyond slavery. Both slavery and servitude are prohibited in any event, regardless of voluntariness or involuntariness.⁸⁷⁶

Different from the above two, ‘forced or compulsory labour’ is ‘all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’ pursuant to ILO29 Article 2(1). The generally accepted definition intimates the essential requirements that the States or private parties extract any work or service from any persons and punishments are threatened if they fail to offer it voluntarily. Among them, compulsion is the fundamental character of forced labour, distinguished from slavery and servitude with ownership or effective dominance of one person over another. This appears to indicate that forced labour is compulsory and forced labourer must be unhappy with compulsion. On the contrary, slavery and servitude does not necessarily contain the compulsory element, and slaves would not be unhappy with compulsion; but with the pain or work.

Without limitation to Article 8(3)(a), the words ‘No one’ appear to broadly include States and private persons that are likely to practice forced labour, while the prohibition of forced labour is mainly directed at State parties⁸⁷⁷. Article 8(3)(a) guarantees freedom from forced labour and prohibits both of them from compelling anyone to perform any work against their will. It also obligates State parties to prevent private persons from engaging in such practices by including various positive measures. This is universally applicable to any circumstances concerning forced labour, even where States ‘extensively regulate the labour market or themselves control it within the scope of a planned economy.’⁸⁷⁸

⁸⁷⁴ Dinstein, in Henkin/1981/126; Joseph/2004/295/[10.02]

⁸⁷⁵ Joseph/2004/295/[10.02]; SCA Section III; Nowak/1993/148/[13]

⁸⁷⁶ Dinstein, in Henkin/1981/126

⁸⁷⁷ Nowak/1993/150/[18]

⁸⁷⁸ Nowak/1993/150

While some States, such as China, provides for the nature of work as both a right and duty of citizens, the right to work should not in theory or in practice contain the provision of the duty to work⁸⁷⁹. ‘Every general duty to work imposed by State parties that carries a penal sanction’⁸⁸⁰ is likely to meet both requirements of forced labour and thus breach its prohibition under Article 8(3)(a).⁸⁸¹ Yet there is no such violation in ‘the mere lapsing of unemployment assistance when a person refuses to accept work not corresponding to his qualifications’.⁸⁸² Without satisfying any conditions required for forced labour, such vagrancy should not be prohibited and any forms of its prohibitions appear to breach Article 8(3)(a).

Additionally, these requirements of forced labour are also important elements for the HRCCom to consider whether facts amount to forced labour or not in a particular case for the purpose of its admissibility. For example, the HRCCom dismissed the case of *Silva et al v. Zambia* because the authors had not sufficiently substantiated ‘how the taxation of their inducement allowance could be seen as constituting forced labour’ under Article 8(3)(a).⁸⁸³

4.2.1.2. Exceptions

Different from Article 8(1) and (2), Article 8(3)(a) permits derogations in certain circumstances as part of the definition of forced labour, under five primary types of cases.

4.2.1.2.1 Hard labour as punishment for a crime

The prohibition of forced labour, by Article 8(3)(b), ‘shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.’ Literally, this appears to expressly regulate that hard labour, as a punishment for a crime is a legally permissible form of compulsory work or service and not an exception to forced labour. This formulation seems to be reasonable considering the practice of some States where

⁸⁷⁹ Ibid./[18]; ICESCR Article 6(1)

⁸⁸⁰ Nowak/1993/151/[19]

⁸⁸¹ Dinstein, in Henkin/1981/128

⁸⁸² Nowak/1993/151

⁸⁸³ *Silva et al v. Zambia*(CN825-828/1999)[6.3]

competent courts impose sentences of imprisonment with hard labour by law.⁸⁸⁴ Yet it is actually no difference from the exception to the general prohibition of forced labour from a legal perspective.

Article 8(3)(b) allows for imprisonment with hard labour, rendered by judgement of a competent court, to be imposed as punishment for a statutorily defined crime. Several primary requirements and procedural guarantees should be noted. Firstly, it tends to apply only to imprisonment with hard labour and not light labour. The ‘classical forms of forced labour in work colonies or camps’⁸⁸⁵ are good examples of hard labour. Accordingly, the punishment relating to forced labour appears to be imposed for serious offences only, which is another requirement. Under ICCPR Article 10(3), however, penitentiary systems shall ‘comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’, which appears to leave no space for hard labour to simply punish criminals. Secondly, the punishment is imposed only for a statutorily defined crime. Considering that crimes are serious offences, this appears to exclude the light offences, which are punishable by administrative punishment such as a fine. Thirdly, it also entails the imposition of the punishment only through a criminal sentence rendered by a competent court according to a law explicitly stipulating such punishment. The criminal sentence must have an explicit statement of the punishment for its performance in pursuance of a sentence’.⁸⁸⁶ This sentence should be rendered by the competent court rather than administrative authorities. This court should supply with all of judicial guarantees. Hence, the only way to impose hard labour as punishment for a crime is the criminal conviction by a competent court on the basis of a law expressly providing for it and the sentence of the court must explicitly state it.

4.2.1.2.2 Work in detention

Article 8(3)(c) precludes four categories of compulsory work or service from the term of ‘forced or compulsory labour’. The first is any ‘work or service... normally required of a person who is under detention in consequence of a lawful order of a

⁸⁸⁴ Nowak/1993/152/[20]

⁸⁸⁵ Ibid./[22]

⁸⁸⁶ ICCPR Article 8(3)(b)

court, or of a person during conditional release from such detention' without being precluded by Article 8(3)(b). Article 8(3)(c)(i) deals with routine work that persons under detention have to do, diverse from the above hard labour. Here work is limited to such routine work or service as 'normally required of a person' during detention or 'conditional release from such detention', e.g., cleaning cells, preparing food.

This detention broadly includes pre-trial detention on the grounds 'contained in the court decision' and 'other forms of judicially imposed custody pursuant to Art. 9'.⁸⁸⁷ Pre-trial detainees seem not to be compelled to work without the grounds for detention in the court decision, whereas it is possible 'in consequence of lawful order of a court'. The words mean that the lawful order of a court must expressly state the work or service as punishment, similar to 'in pursuance of a sentence' in Article 8(3)(b). This leaves no room for an administrative authority to make specific directives on such work without explicit lawful order of a court as a legal basis.

Article 9 ICCPR prohibits all forms of arbitrary arrest or detention, except for ones 'on such grounds and in accordance with such procedure as are established by law'. This appears to allow any forms of 'judicially imposed custody' rendered by a competent court pursuant to law in the above-mentioned detention. It also requires the lawful administrative detention must be directly reviewed by a competent court in the way of proceedings.

In view of the penitentiary system in Article 10(3), prison labour has the essential aim of the 'reformation and social rehabilitation' of prisoners. The work by prisoners during conditional release also appears to follow the same approach. Hence, the routine work in Article 8(3)(c)(i) tends to have the character of the social rehabilitation of persons undergoing detention or those on conditional release from it.

4.2.1.2.3 Military and national service

The second category of exception is any 'service of a military character and, in countries where conscientious objection' is recognised, 'any national service

⁸⁸⁷ Norwak/1993/153/[25]

required by law of conscientious objectors'. Article 8(3)(c)(ii) addresses military and national service as another exception. This involves all forms of military service and any national one that is required by law of conscientious objectors in countries which recognise conscientious objection.

The military and national service is qualified with conscientious objection or objectors. This formulation results from the practice of a few States to recognise this right, whereas the right of conscientious objection appears not to be inferred from such qualifications.

4.2.1.2.4 Duties in cases of emergency

Exceptions will also apply in circumstances where any service is 'exacted in cases of emergency or calamity threatening the life or well-being of the community'⁸⁸⁸. Article 8(3)(c)(iii) deals with duties in the event of all emergencies or calamities, regardless of public or local, which threaten 'the life or well-being of the community'. Without an explicit list of such emergencies or calamities in this provision or significant discussions in the working groups of the HRCCom, ILO29 Article 2(2)(d) appears to be helpful in elaborating on this exception. It specifies situations such as war, fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animals, insect or vegetable pests.

4.2.1.2.5 Normal civic obligations

The fourth is any 'work or service which forms part of normal civil obligations'. Article 8(3)(c)(iv) provides for another exception, that is, any forms of work or service that amount to normal civil obligations, without a specification of such obligations. This provision derives from, albeit differs from, ILO29 Article 2(2)(b) and (e).

Considering this relationship between the two provisions, these normal civil obligations appear to refer to such forced labour that recognise that it is absolutely necessary to fulfil State functions and unable to be accomplished in non-forcible manners. This seems to primarily include both professional duties and most traditional civic obligations. However, traditional obligations are likely to be

⁸⁸⁸ ICCPR Article 8(3)(c)(iii)

related to emergencies or calamities and thus have been overlapped by Article 8(3)(c)(iii). Hence, they appear to be professional duties and traditional civic obligations without falling into the category of the duties in emergency.

4.2.2 Other Relevant Provisions

Apart from ICCPR Article 8(3), some of other provisions in the ICCPR appear to relate to the prohibition of forced labour. These are mainly Articles 9, 10 and 14.

Specifically, ICCPR Article 9 details ‘the right to liberty and security of person’. This contains a series of human rights procedural guarantees to restrict the deprivation of personal liberty and security. Article 9(1) requires the principles of legality and prohibition of arbitrariness; Article 9(2) deals with the rights to information; Article 9(3) addresses special rights for those in detention. Article 9(4) requires anyone ‘who is deprived of his liberty by arrest or detention’ to be entitled with the right to have the detention decided in court without delay. This allows for courts only to decide whether the detention is lawful or not. Article 9(4) stipulates the right of the victims of unlawful arrest or detention to compensation.

Moreover, Article 10 addresses the right of detainees to be treated with humanity and dignity. Humane treatment and respect for human dignity is essential to the reformation and social rehabilitation of prisoners in penitentiary systems. Article 14 details the procedural guarantees in civil and criminal trials, which equally applies to both RTL and RETL⁸⁸⁹.

Additionally, there are more relevant provisions in international human rights law. These will be examined in the following sections:

4.3 The UDHR

Article 4 UDHR lays down that ‘[N]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms’. This makes no reference to forced labour and seems not to mention its prohibition, whereas the implementation of forced labour is likely to violate certain rights relating to work.

Article 23(1) stipulates that everyone ‘has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against

⁸⁸⁹ See Chapter V

unemployment'. This specifies four rights: the right to work; the right to free choice of employment; the right to just and favourable conditions of work; and the right to protection against unemployment. The requirements of these rights seem to leave no room for the existence of forced labour. With an element of compulsory labour, there appears no real right to work, to free choice of employment, to just and even favourable working conditions.

Article 23(2) declares that everyone 'has the right to equal pay for equal work' 'without any discrimination'. This is the specific application of non-discrimination principle and generally applies to all workers to fully and effectively protect the right to equal pay for equal work.

Article 23(3) requires 'just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity' to protect the right to fair pay. It also noted that other means of social protection may supplement living standards to ensure this existence for them, as the only one among all relevant human rights standards.

Article 24 also stipulated that everyone 'has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.' It lists the right to rest and leisure, which includes the reasonable arrangement of working hours and periodic holidays.

This appears to classify work-related rights as composing of three groups from the socio-economic perspective. They include 'employment-related rights', 'rights derivative of employment as consequential to labour relationship' and those 'from an angle of non-discrimination and equality of treatment'⁸⁹⁰. The right 'to free choice of employment' falls into the first category. The right 'to just and favourable conditions of work' appears to mainly involve 'working hours, annual paid holiday and other rest periods'.⁸⁹¹ In addition to that, the second category primarily contains 'the right to safe and healthy working conditions, the right to a fair remuneration, the right to vocational guidance and training' and 'the right to social security'⁸⁹². As the third, the right to non-discrimination and equality of treatment found its position in Articles 7 and 23(2).

⁸⁹⁰ Drzewicki, in Eide, Krause, Rosas/2001/227

⁸⁹¹ Ibid.

⁸⁹² Ibid.

4.4 The ICESCR

Since the 27th June 2001, China has been a party to the ICESCR and this treaty has had a legally binding force on China. There are now a range of obligations imposed upon China and some of these are worthy of further discussion.

Similar to the UDHR, the ICESCR does not have a provision expressly dealing with forced labour, but has a number of concerns with a range of social-economic rights relating to work to imply its prohibition. They mainly contain Articles 2(2) and 3 respectively dealing with non-discrimination and equality, Article 6 on the right to freely chosen work, Article 7 concerning the right to just and favourable conditions of work, Article 8 on the rights relating to trade unions and Article 11 on the right to an adequate standard of living and the right to food and living. Among them, the relevant rights contained in Articles 2(2), 3, 6 and 7 basically conflict with forced labour with the compulsory element and might be breached in the implementation of compulsory work. Accordingly, the prohibition of forced labour appears to contribute to protecting these rights and protection of the right to work implies this prohibition.

Article 2(2) generally stipulates the obligation of State parties to guarantee the principle of non-discrimination in protecting human rights enunciated in the ICESCR. Specifically, by Article 3, these parties are obliged to ‘ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights’ required in this treaty. This equality principle appears to be the application of non-discrimination in the protection of such rights between men and women.

Article 6(1) ‘includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’. This essentially includes the right to free choice of employment as found under UDHR Article 23(1), but under the ICESCR the right has been expanded to include the opportunity to gain a living. Accordingly, the qualified and progressive obligation that State parties should undertake is to safeguard these rights and aim at its full realisation⁸⁹³ through ‘appropriate steps’⁸⁹⁴. These measures are ‘technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social

⁸⁹³ ICESCR Article 6(2)

⁸⁹⁴ ICESCR Article 6(1)

and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual' under Article 6(2).

State parties, by Article 7, also undertake the obligation to recognise the right of everyone to the enjoyment of just and favourable conditions of work'. Matters concerning forced labour are not addressed here, while the performance of this labour appears to run counter to the requirements of the above rights on work. Article 7(a) ensures fair wage and a decent living for protection of the right to fair pay. It also emphasises 'work of equal value' 'without distinction of any kind', particularly between women and men, as a requirement for 'equal pay for equal work'. Article 7(b) requires the safeguard of 'safe and healthy working conditions' to protect the right to proper working conditions. Article 7(c) is the only provision to provide for the right of equal opportunity to be promoted, subject to considerations of seniority and competence only. Article 7(d) provides for the right to 'rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'. This appears to regard five distinct rights, differing from UDHR Article 24.

Additionally, the above rights are non-derogable in any circumstances under the ICESCR. By Article 5(2), no 'derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted'. This is equally applicable to the right to work as an economic right.

4.5 The CMW

The CMW is designed to safeguard all migrant workers and members of their families. Article 11 explicitly prohibits slavery, servitude and forced or compulsory labour from being imposed on any migrant worker or member of his or her family. It permits derogations from the prohibition of forced labour, but not from that of slavery or servitude. In comparison with ICCPR Article 8(3), this appears to follow the similar approach, but with a narrower scope in its application.

CMW Article 11(2) excludes any 'migrant worker or member of his or her family' from being required to perform forced or compulsory labour. The term

‘migrant worker’, by Article 2(1), means ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’ in the CMW. Members ‘refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned’, pursuant to Article 4. These groups fall within the applicable scope of Article 11(2), unlike a general extent of ICCPR Article 8(3)(a).

Likewise, CMW Article 11(3)-(4) stipulated several exceptions, namely, hard labour as punishment for a crime, work in detention, duties in cases of emergency and normal civic obligations. This is respectively similar to ICCPR Article 8(3)(b), 8(3)(c)(i), 8(3)(c)(iii) and 8(3)(c)(iv). The obvious difference is the omission of military and national service as required in 8(3)(c)(ii), which would not be expected of non-nationals. The other is to stress ‘so far as it is imposed also on citizens of the State concerned’ in excluding ‘work or service that forms part of normal civil obligations’ from the prohibition of forced labour in CMW Article 11(4)(c). These appear to result from the limited groups that the CMW is intended to protect.

4.6 The CRC

Among the various rights of children that the CRC details, the right not to be subjected to forced labour might be found mainly in the following several principles and provisions. These protect children from forced labour and promote their harmonious development.

The principle of the best interests of the child provided in Article 3 appears to leave no space for the possible abuses of children’s rights, e.g., the right not to be subjected to forced labour. As a party to the CRC, China has the obligation to take all appropriate measures to ensure the protection of children from being subjected to this labour in the best interests of them. It ratified the ILO182 and made a national policy of safeguarding children from economic exploitation and prohibiting child labour on the basis of a system of the relevant laws and

regulations.⁸⁹⁵ Moreover, the Chinese government agencies concerned are ‘resolutely opposed to the use of child labour and forcing children to work, and firmly combats any and all such activity in accordance with the law’.⁸⁹⁶ For example, they have made great efforts to safeguard the rights of ‘disabled children who are...forced to work as beggars, or healthy children who are...deliberately mutilated and similarly forced to beg’.⁸⁹⁷

By Articles 32 and 34, China undertakes the obligation to protect children respectively from economic exploitation, including child labour; and from sexual exploitation or abuse. China has made a range of legislative and administrative measures to strictly ‘combat criminal activity that infringes children’s sexual rights’.⁸⁹⁸ But some of children are to be compelled into the performance of child labour or ‘the sale of sexual services’ in practice.⁸⁹⁹ Accordingly, all agencies of the Chinese Government have taken joint action in ‘a variety of ways to reduce sexual offences involving children and to protect children’s legitimate rights and interests’.⁹⁰⁰

Article 37 imposes China the obligation to ensure no child to be subjected to torture, other cruel, inhuman or degrading treatment or punishment in any form. Forced labour is likely to become a form of such treatment. ‘If it is found that the law-enforcement authorities are the source of any problems for a juvenile offender’, e.g., forced labour, ill-treatment, or humiliation, the PP must immediately redress them.⁹⁰¹ If these ‘actions in question are found to amount to crimes, they must be investigated and responsibility attributed’ by law.⁹⁰² There is no torture of children in China with the careful protection of all children’s lawful rights by the competent judicial bodies.⁹⁰³

4.7 The CAT

⁸⁹⁵ ‘Second Periodic Report of States Parties Due in 1997: China. 15/07/2005’, CRC/C/83/Add.9/14/[333-339]

⁸⁹⁶ Ibid./[340-343]

⁸⁹⁷ ‘Initial Reports of States Parties Due in 2005: China. 01/09/2005’, CRC/C/OPSA/CHN/1/37(China)[195]

⁸⁹⁸ ‘Initial Reports of States Parties Due in 1994: China. 01/08/95’, CRC/C/11/Add.7(China)[231-238; 251-257]; ‘Second Periodic Report of States Parties Due in 1997: China. 15/07/2005’, CRC/C/83/Add.9[360-367]

⁸⁹⁹ ‘Initial Reports of States Parties Due in 2005: China. 01/09/2005’, CRC/C/OPSA/CHN/1/37(China)[369]

⁹⁰⁰ ‘Initial Reports of States Parties Due in 1994: China. 01/08/95’, CRC/C/11/Add.7(China)[258-260];

‘Second Periodic Report of States Parties Due in 1997: China. 15/07/2005’, CRC/C/83/Add.9[368-375]

⁹⁰¹ ‘Second Periodic Report of States Parties Due in 1997: China. 15/07/2005’, CRC/C/83/Add.9(China)[115]

⁹⁰² Ibid.

⁹⁰³ ‘Initial Reports of States Parties Due in 1994: China. 01/08/95’, CRC/C/11/Add.7(China)[79]

This treaty specifies the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in all forms. The performance of forced labour is likely to involve cruel, inhuman or degrading treatment and even torture, even if forced labour itself is not any of them in nature. All the relevant human rights norms in the CAT are equally applicable to the event of forced labour.

As a State party to the CAT,⁹⁰⁴ China is obligated to prevent torture in forced labour cases, through effective legislative, administrative, judicial or other measures, in all areas under its jurisdiction without derogations under Article 2(1). The inclusion of torture into criminal law, as an offence punishable by appropriate penalties, is essential by virtue of Article 4. Such forced labour that brings ‘severe pain or suffering’ ‘intentionally inflicted’, instigated, or consented by public officials or others ‘acting in an official capacity’ as a means to obtain information or a confession, to punish offenders or suspects, to intimidate, coerce, or discriminate against, someone, may constitute torture in accordance with Article 1(1). In the implementation of forced labour, only those subjected to forced labour may suffer from potential torture. Article 1(1) also excludes ‘pain or suffering arising only from, inherent in or incidental to lawful sanctions’ from the scope of torture, which means that forced labour as a lawful sanction does not amount to torture under the CAT.

Moreover, China has the obligation not to ‘expel, return (“refouler”) or extradite’ a labourer ‘to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’ in forced labour cases, under Article 3(1). The obligation requires China not to engage in such conducts, but undertake active steps to prevent such occurrences arising. Meanwhile, Article 3(2) requires the competent authorities to ‘take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights’. This is an active duty to consider whether systematic human rights violations exist or are occurring.

Another active duty of China is to ‘ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate

⁹⁰⁴ See 2.4

compensation, including the means for as full rehabilitation as possible'.⁹⁰⁵ This clause requires that compensation be given to the victims dependants where acts of torture lead to the death of the labourer in the case of forced labour. Accordingly, China has the 1994PL expressly prohibiting 'the torture of prisoners by anyone for any reason', and a range of laws and departmental regulations providing for the obligation to award compensation to the victims concerned.⁹⁰⁶ These mainly contain 1982Constitution Article 41, Administrative Procedure Law of the PRC adopted in 1990 Articles 2, 67, 68, 1995PPL Article 50, and 1994SCL Articles 2, 6, 15, 16, 23, 25.⁹⁰⁷

Furthermore, the prohibition of cruel, inhuman or degrading treatment is possible to be breached in forced labour cases. This is related to some rights in work, the breaches of which may amount to cruel, inhuman or degrading treatment or punishment. The prohibition of such treatment is a legal obligation of China under Article 16(1).

All the above-mentioned obligations on torture and Articles 10-13 apply equally to cruel, inhuman or degrading treatment or punishment. They are also the very duties that China should perform in handling forced labour cases. In fact, 'China has passed the legislation to prevent any civil servant or person performing an official function from exercising, instigating, consenting to or acquiescing in acts of treatment or of punishment that are cruel, inhuman or degrading'.⁹⁰⁸

4.8 Subsidiary Instruments

4.8.1 The CLN

The CLN makes no explicit reference to forced labour. But Article 23(a) relates to the prohibition of such labour from the socio-economic perspective.

Article 23(a) specified that the LN Members 'will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend'. This requires fair and humane conditions for all labourers without discrimination and contains the requirements of fairness, humanity and

⁹⁰⁵ CAT Article 14(1)

⁹⁰⁶ 'Third Periodic Reports of State Parties Due in 1997: China', CAT/C/39/Add.2/[50]

⁹⁰⁷ 'Second Periodic Reports of State Parties Due in 1993: China', CAT/C/20/Add.5/[45-54]

⁹⁰⁸ Ibid./[58-63]; 'Third Periodic Reports of State Parties Due in 1997: China', CAT/C/39/Add.2/[54-57]

anti-discrimination. Since compulsory elements in work run contrary to these requirements, Article 23(a) appears to leave no room for forced labour to be imposed. Hence, the immediate obligation by Article 23(a) is to satisfy the above conditions and the prohibition of forced labour appears to be one of the important objectives.

4.8.2 The SSFL

As an important instrument on forced labour by the LN, the SSFL mentions both general requirements and as well as specific details in the socio-economic context. Generally, it requires State parties ‘to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery’⁹⁰⁹ in Article 5.

Specifically, Article 5 allows for compulsory or forced labour to ‘only be exacted for public purposes’ as an exception. The State parties ‘in which compulsory or forced labour for other than public purposes still survives’ are obligated to ‘endeavour progressively and as soon as possible to put an end to the practice.’⁹¹⁰ ‘So long as such forced or compulsory labour exists’, they shall ensure that this labour to ‘invariably be of an exceptional character’, to ‘always receive adequate remuneration’, and not to ‘involve the removal of the labourers from their usual place of residence’.⁹¹¹

Furthermore, State parties shall take ‘the responsibility for any recourse to compulsory or forced labour’ and it shall ‘rest with the competent central authorities of the territory concerned’ in all cases concerned by Article 5(3). This is the essential procedure that must exist for the imposition of any such labour.

4.8.3 The ILO29

As the derivation of prohibiting forced labour, the ILO29 details the prohibition of forced labour in a comprehensive way. It deals with its prohibition to protect the relevant rights in performance of labour.

⁹⁰⁹ SSFL Article 5

⁹¹⁰ SSFL Article 5(2)

⁹¹¹ Ibid.

Under Article 1(1), every State party ‘undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.’ Article 1(2) requires that ‘recourse to forced or compulsory labour may be had, during the transitional period, for public purposes only’, ‘as an exceptional measure’, and subject to requisite conditions and guarantees, to accomplish ‘this complete suppression’.

Article 2 (1) defines the concept of forced labour to limit its general scope, whereas Article 2(2) excludes a few cases as exceptions. The first is ‘work or service exacted in virtue of compulsory military service laws for work of a purely military character’⁹¹², which is similar to military service in ICCPR Article 8(3)(c)(ii). The second is that forming ‘part of the normal civic obligations of the citizens of a fully self-governing country’⁹¹³, different from ICCPR Article 8(3)(c)(iv).

The third is that ‘exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations’⁹¹⁴. This appears to include hard labour as punishment for a crime and work in detention respectively in ICCPR Article 8(3)(b) and (c).

The fourth is that ‘exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population’⁹¹⁵. This exception specifies duties in cases of emergency, dissimilar to the simple expression in ICCPR Article 8(3)(c)(iii).

The fifth is the minor ‘communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct

⁹¹² ILO Article 2(2)(a)

⁹¹³ ILO Article 2(2)(b)

⁹¹⁴ ILO Article 2(2)(c)

⁹¹⁵ ILO Article 2(2)(d)

representatives shall have the right to be consulted in regard to the need for such services'⁹¹⁶. This is unlike ICCPR Article 8(3)(c)(iv).

Meanwhile, the imposition and implementation of forced labour primarily relate to socio-economic rights. Specially, Article 11 determines that 'only able-bodied males who are of apparent age of not less than 18 and nor more than 45 years may be called upon for forced or compulsory labour'. Article 12 stipulates that the 'maximum period for which any person may be taken for forced or compulsory labour of all kinds in any one period of twelve months'. Article 14 provides for the remuneration of forced labour, with the exception of that for purpose of public undertakings. Article 15 states certain minimum social claims in the cases of accidents, sickness, disability or death. Although general human rights instruments, e.g., the ICCPR, keep silent on these points, the relevant minimum legal standards remain to be protected in the case of forced labour.

4.8.4 The ILO100

Upon its ratification on 2nd November 1990, China became a party to this treaty. It should assume the following treaty obligations on the rights in work.

ILO100 Article 2(1) obliges its State parties, 'by means appropriate to the methods in operation for determining rates of remuneration', to 'promote and, insofar as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value'.⁹¹⁷ This obligation is qualified and progressive in form, which requires China to take appropriate measures to promote and ensure the application of equal remuneration principle.

'Remuneration' 'includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment'.⁹¹⁸ The principle of 'equal remuneration for men and women workers for work of equal value' refers to rates of remuneration established without

⁹¹⁶ ILO Article 2(2)(e)

⁹¹⁷ ILO100 Article 1(1)

⁹¹⁸ ILO100 Article 1(a)

discrimination based on sex'.⁹¹⁹ However, differential rates between workers are not necessarily contrary to the principle. This depends on whether this divergence corresponds, 'without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed'.⁹²⁰

4.8.5 The ILO105

The later ILO105 requires the State parties, in Article 1, 'to suppress and not to make use of any form of forced or compulsory labour'. Such labour may be used only in several cases specified in Article 1.

The first is 'a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system'. The second is 'a method of mobilising and using labour for purposes of economic development'. Others also contain 'a means of labour discipline', 'a punishment for having participated in strikes', and 'a means of racial, social, national or religious discrimination.'

Accordingly, every State party should undertake 'to take effective measures to secure the immediate and complete abolition of forced or compulsory labour' in any forms above-mentioned.

4.8.6 The ILO122

ILO122 began to have legal effect on China following its date of ratification on 17 December 1997. There are several primary obligations on labour.

By Article 1(1), China 'shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment'. This permits its progressive realisation of the main goal by implementing an active policy and its obligation is qualified and progressive in form.

China has to ensure several aims to be gradually realised by the above means. Under Article 1(2), these aims are to ensure that there is 'work for all who are available for and seeking work'; that such 'work is as productive as possible'; and that there is 'freedom of choice of employment and the fullest possible opportunity

⁹¹⁹ ILO100 Article 1(b)

⁹²⁰ ILO100 Article 3(3)

for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited' without any discrimination.

Article 1(3) stressed that 'the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives' should be considered in policy-making. It also noted that methods should be 'appropriate to national conditions and practices'. Accordingly, China has the obligation to recognise these issues to make a reasonable policy and take proper methods to implement the policy in the light of such conditions and practices.

4.8.7 The ILO182⁹²¹

China ratified the ILO182 on 8 August 2002 and has been a party to this treaty since that time. Among the 16 Articles, Articles 1, 2, 3 and 6 directly or indirectly relate to forced labour and set out China's obligations.

Article 1 requires China to 'take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency'. This obligation is qualified and progressive in form. In the ILO182, 'the term *child* shall apply to all persons under the age of 18'.⁹²²

Article 3 defined the phrase of 'the worst forms of child labour' in detail. By it, 'all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict' fall into the category of such child labour.⁹²³

Hence, China is obliged to take immediate and effective measures to prohibit children from being subject to the worst forms of child labour, including forced labour, in order to strengthen the implementing of the ILO182.

4.9 Regional Human Rights Law

4.9.1 The ECHR

4.9.1.1 General considerations

⁹²¹ 38/ILM/1207(1999)

⁹²² ILO182 Article 2

⁹²³ ILO182 Article 3

Similar to the ICCPR, the ECHR explicitly provides for prohibition of forced labour in an absolute and immediate approach. Article 4(2) states that ‘No one shall be required to perform forced or compulsory labour’. This is generally considered to amount to a freedom from forced labour and several points need to be noted here.

The first is the definition of ‘labour’. Without restrictions on forced or compulsory labour, the word labour is likely to extend to manual work and other various forms of work or service. Although considering the wording of Article 4(3), labour appears to cover ‘any work or service’, regardless of physical or mental forms.

The second point is the meaning of ‘forced or compulsory labour’. The EHRCourt considered its definition in ILO29 Article 2(1) as ‘a starting-point for interpretation’ of ECHR Article 4 and subject to the dynamic feature of the ECHR as ‘a living instrument’.⁹²⁴ In ILO29, the term means that ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. This includes the basic features and requirements of ‘forced or compulsory labour’, namely a ‘penalty’ and involuntariness. Without these requirements, there is no room for any work or service to amount to such labour. With them, not all, but only some, work or service may constitute such labour because currently prevailing ideas tend to be the other factor to influence its true meaning in the development of international human rights law.

There appears to be no element of ‘penalty’ or involuntariness in such free legal services that lawyers provide to assist indigent defendants. In *Van der Mussele v Belgium*⁹²⁵ a pupil advocate from Belgium that such assistance was tantamount to forced labour and therefore in breach of the CRC. The EHRCourt noted, ‘in accordance with a long-standing tradition’ of Belgium and certain other States, the rules of entering legal profession is to render legal ‘services free of charge and without reimbursement’ of expenses.⁹²⁶ Accordingly, the applicant had to accept such requirements in order to become a lawyer, which appears to determine the limitation of his free consent. The European Commission of Human

⁹²⁴ Van Der Mussele v. Belgium/[32]

⁹²⁵ Van Der Mussele v. Belgium

⁹²⁶ Ibid./[20]

Rights stressed that two collective conditions be satisfied that the labour must 'be performed by the person against his or her will' and the obligation must be 'unjust' or 'oppressive and even result in 'an avoidable hardship'.⁹²⁷ Hence, the work required of the applicant was labour in the sense of Article 4(2).

Moreover, the threat of being struck off the roll of pupils seems to reach the degree of a 'penalty' in Article 4(2). Meanwhile, whether the applicant is acting voluntary or not depends on whether his prior consent has a 'considerable and unreasonable imbalance between the aim pursued'⁹²⁸ and the obligations accepted. The service imposed a 'burden which was so excessive or disproportionate to the advantages attached to the future exercise of [the legal] profession that the service could not be treated as having been voluntarily accepted'.⁹²⁹ This seems to meet the requirements of forced labour, while the legal services appear to fall into the category of 'normal civic obligations' in Article 4(3)(d) as an exception to Article 4(2). Hence, it is not forced labour where lawyers provide legal services free of charge to help indigent defendants. Additionally, there appears no such labour where a notary 'charge less for work done for no-profit-making organi[s]ations', or where an employer deducts 'social security payments or income tax from an employee's salary', or where an unemployed person accepts 'a job offer on pain of losing his unemployment benefit'.⁹³⁰

Article 4 places the obligation on States not to require forced labour of human individuals or to permit private bodies or individuals to subject others to such labour. In the *Van der Musselle* case, the State should take its responsibility to protect the applicant who complained that a private employer required forced labour of him under national law.

4.9.1.2 The specific scope of permitted work or service

Article 4(3) excludes several forms of work or service from the general scope of forced labour prohibited by Article 4(2). These permitted kinds of work or service appears to be exceptions to the prohibition of forced labour in Article 4(2) and contribute to part of the definition of this labour.

⁹²⁷ Ibid./[37]

⁹²⁸ Ibid./[40]

⁹²⁹ Ibid./[37]

⁹³⁰ Harris, O'Boyle, Warbrick/1995/93

Under Article 4(3)(a), the first exception is ‘any work required to be done in the ordinary course of detention imposed’ according to ECHR Article 5 or ‘during conditional release from such detention’. This includes any work during detention permitted by Article 5 and during conditional release from this detention. It is essential to clarify the nature of detention in any forms in this context.

Article 5(1) protects ‘the right to liberty and security of person’ and permits its deprivation in certain cases ‘in accordance with a procedure prescribed by law’. These cases are ‘the lawful detention of a person after conviction by a competent court’; ‘the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law’, ‘the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’; ‘the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority’; ‘the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants’; ‘the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition’. The same feature of these kinds of detention is lawful and such lawful detention is ‘the most common case’⁹³¹.

By Article 5(4), nonetheless, ‘[E]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’ This appears to leave the possibility of unlawful detention as part of detention in the sense of Article 4(3)(a), since its lawfulness remains to be decided by a court. Meanwhile, this has been supported by *Van Droogenbroeck v Belgium*⁹³² and *Vagrancy v. Belgium*⁹³³. In *Van Droogenbroeck* case, the EHRCourt considered that the unlawful detention in breach of Article 5(4) ‘does

⁹³¹ Ibid./94/[i]

⁹³² *Van Droogenbroeck v. Belgium*/[59]

⁹³³ *Vagrancy v. Belgium*/[89]

not automatically mean that there has been failure to observe Article 4'.⁹³⁴ This appears to explain the potential relationship between unlawful detention and forced labour, that any work during unlawful detention may comply with its prohibition and not be forced labour. Similar considerations also appeared in the case of *Vagrancy*⁹³⁵.

The other important task is to elucidate the meaning of 'ordinary' in interpretation of Article 4(3)(a). As cases of *Van Droogenbroeck* and *Vagrancy* indicated, 'ordinary' means that the duty to work imposed on labourer 'aimed at their rehabilitation' on the legal basis of 'a general standard' in Europe.⁹³⁶ Hence, 'this wording refers not only to the work that the State concerned ordinarily requires of a detained person; it also incorporates a European standard by which a particular state's practice can be measured.'⁹³⁷

Secondly, Article 4(3)(b) excludes 'any service of a military character or, in case of conscientious objectors in countries where they are recogni[s]ed, service exacted instead of compulsory military service'. Literally, 'any service of a military character' includes any forms of military service, open to 'voluntary enlistment in the armed forces as well as compulsory military service'⁹³⁸. This appears to leave no room for the complaint that the length or conditions of compulsory military service constitute forced labour.⁹³⁹

Substitute civilian service is also exempted from the definition of 'forced labour'. If conscientious objectors refuse compulsory military service, they may be imposed on compulsory service of military feature. But in countries where to recognise them, the States have one more option, that is, ensuring performance of civilian work to replace the above military service.

Thirdly, Article 4(3)(c) excludes 'any service exacted in case of an emergency or calamity threatening the life or well-being of the community'. This involves any kinds of service in such an emergency that threatens the life or well being of the community, e.g., the lack of volunteer dentists⁹⁴⁰. The service required in calamity

⁹³⁴ *Van Droogenbroeck v. Belgium*/[59]

⁹³⁵ *Vagrancy v. Belgium*/[89]

⁹³⁶ *Ibid.*/[90]; *Van Droogenbroeck v. Belgium*/[59]

⁹³⁷ Harris, O'Boyle, Warbrick/1995/95/[i]

⁹³⁸ *Ibid.*/[ii]

⁹³⁹ *Ibid.*

⁹⁴⁰ *Ibid.*/96/[iii]

to some degree, exactly the same as in the above emergency, is equally included in Article 4(3)(c). Such calamity may be floods, a failed harvest, rabies or others that put the life or well being of the community at risk.

Fourthly, Article 4(3)(d) excluded ‘any work or service which forms part of normal civic obligations.’ In this context, normal civic obligations appear to be formed on the basis of professional requirements, social necessities, or moral values.

In sum, Article 4(3) obliges the State party to take measures to ensure these four kinds of work or service to be done. The compliance of such legally permitted obligations tends not to defeat the prohibition of forced labour.

4.9.2 The ESC

As a complementary instrument to the EHRC,⁹⁴¹ the ESC details a range of economic and social rights, and corresponding obligations of State parties, qualified and progressive in form. Those rights which exist for persons in labour may be explained in detail as follows.

ESC Article I, (1) states that ‘everyone shall have the opportunity to earn his living in an occupation freely entered upon’. This provides for the right to the opportunity to earn his living only, without a specification of this right. For the achievement of this right, ESC Article II, 1 lists several ways that the obligations of State parties can be fulfilled, most of which are similar to those steps required by ICESCR Article 6(2).

ESC Article I, (2) provides for the right of all workers to ‘just conditions of work’, which requires State parties to assume obligations to practice this right under ESC Article II, 2. The relevant provisions in ESC Article II, 2 expand the rights of rest, leisure, ‘reasonable daily and weekly working hours’, and ‘holidays with pay’ in detail, whereas these are only limited to rest and leisure and not relate to ‘just conditions of work’ in ESC Article I, (2).

ESC Article I, (3) requires all workers to have ‘safe and healthy working conditions’. ESC Article II, 3 then provides for a series of specific measures to realise such conditions. Accordingly, State parties should undertake the obligations

⁹⁴¹ Sieghart/1983/27/[2.6]

‘to issue safety and health regulations’; ‘to provide for the enforcement of such regulations by measures of supervision’; and ‘to consult, as appropriate, employers’ and workers’ organisations on measures intended to improve industrial safety and health’.

ESC Article I, (4) stipulates that ‘All workers have the right to a fair remuneration’, the standard of which is whether or not to sufficiently provide with ‘a decent standard of living for themselves and their families.’ This appears to contribute to the right of fair pay. In order to ensure the effective exercise of this right, ESC Article II, 4 imposes on State parties a range of obligations. States are required to recognise ‘the right of workers to a remuneration such as will give them and their families a decent standard of living’, ‘of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases’, ‘of men and women workers to equal pay for work of equal value’, ‘of all workers to a reasonable period of notice for termination of employment’; and ‘to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards’.⁹⁴²

4.9.3 The ADRDM

The ADRDM enumerated a catalogue of human rights and freedoms in various different aspects. There are three primary articles concerning the rights in work, although there is no mention of forced labour.

ADRDM Article XIV stipulates that everyone ‘has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit’. Considering the wording of ‘in so far as existing conditions of employment permit’, this appears not to protect against unemployment. The instrument also states that everyone ‘who works has the right to receive such remuneration’, ‘in proportion to his capacity and skill’, to ‘assure him a standard of living suitable for himself and for his family’. This appears to protect every worker’s right to fair pay.

⁹⁴² ESC Article II, (4)

ADRDM Article XV details ‘the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit’. It specifies the use of leisure and makes no reference to working hours or holiday pay.

ADRDM Article XXXIV states that ‘It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defence and preservation, and, in case of public disaster, to render such services as may be in his power.’ It considers civil and military service as a duty and this is only applicable to able-bodied persons in public disaster. This is different from other related human rights norms.

Additionally, there is no right to equal pay for equal work or to promotion, to proper working conditions, or to promotion, inferred from the ADRDM.

4.9.4 The ACHR

The ACHR contains express provisions on the prohibition of slavery and forced labour under Article 6 and is titled ‘Freedom from Slavery’, diverse from Prohibition of slavery and forced labour in ECHR Article 4. This seems to imply that forced or compulsory labour has a close relation to, and should be banned to avoid its development into, slavery or slavery-like practices.

‘No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and trafficking of women’, nor be required to perform forced or compulsory labour under ACHR Article 6(1) and (2). This requires State parties to undertake relevant obligations in an absolute and immediate way. Yet this ‘shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty’ at forced labour, ‘the carrying out of such a sentence imposed by a competent court is prohibited.’⁹⁴³ Such labour ‘shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.’⁹⁴⁴

Article 6 also lists several exceptions to forced labour, like ICCPR Article 8 and ECHR Article 4. The first is ‘work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent

⁹⁴³ ACHR Article 6(2)

⁹⁴⁴ Ibid.

judicial authority' under Article 6(3)(a). Such work or service requires 'the supervision and control of public authorities', instead of 'the disposal of any private party, company, or juridical person'.⁹⁴⁵

The second is 'military service and, in countries in which conscientious objectors are recognised, national service that the law may provide for in lieu of military service', by Article 6(3)(b). The third is 'service exacted in time of danger or calamity that threatens the existence or the well-being of the community' and the fourth is 'work or service that forms part of normal civic obligations' under Article 6(3)(c) and 6(3)(d).

In addition, the prohibition of forced labour required by Article 6 appears to be derogable, considering 'in time of danger or calamity that threatens the existence or the well-being of the community' by Article 6(3)(c). This is different from the prohibition of slavery and servitude, which is non-derogable in any circumstances under Article 27(2).

4.9.5 The ACHPR

As the fourth regional human rights treaty,⁹⁴⁶ the ACHPR imposed absolute and immediate obligations on both State parties and individuals in various respects. There are several points worthy of note.

'All forms of exploitation and degradation of man, particularly slavery, slave trade,...shall be prohibited' as per AFR Article 5. This imposes on State parties the absolute and immediate obligation to prohibit exploitation and degradation of man in all their forms. This implies the prohibition of slavery, slave trade and forced labour.

ACHPR Article 15 declared that every 'individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work'. This general expression appears to indicate the rights to work, to proper working conditions and to equal pay for equal work, among all workers and not only between women and men.

Under Article 29, the individual shall have the duty to do the following things. The first is 'to preserve the harmonious development of the family and to work for

⁹⁴⁵ ACHR Article 6(3)(a)

⁹⁴⁶ Sieghart/1983/29/[2.9]

the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need'.⁹⁴⁷ The second is to 'serve his national community by placing his physical and intellectual abilities at its service'.⁹⁴⁸ The third is not 'to compromise the security of the State whose national or resident he is'.⁹⁴⁹ The fourth is to 'preserve and strengthen social and national solidarity, particularly when the latter is threatened'.⁹⁵⁰ The fifth is to 'preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law'.⁹⁵¹ Among them, the second duty appears to form part of normal civic obligations and the fifth tends to fall within the category of military service in emergency. These may be excluded from the definition of forced labour.

The sixth is to 'work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society'.⁹⁵² This imposes the requirement of work to be done 'to the best of his abilities and competence' as a duty. The seventh is 'to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society'.⁹⁵³ The eighth is to 'contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity'.⁹⁵⁴

4.10 Possible Customary International Law Concerned

With the development of international human rights law, some norms mentioned above are likely to have a customary feature. The first problem is whether the prohibition of forced labour is a customary rule.

Among the above instruments that explicitly mention forced labour, the location of its prohibition is alongside the prohibition of slavery as 'one of the first human rights...in public international law'⁹⁵⁵ within the anti-slavery norms. This

⁹⁴⁷ ACHPR Article 29(1)

⁹⁴⁸ ACHPR Article 29(2)

⁹⁴⁹ ACHPR Article 29(3)

⁹⁵⁰ ACHPR Article 29(4)

⁹⁵¹ ACHPR Article 29(5)

⁹⁵² ACHPR Article 29(6)

⁹⁵³ ACHPR Article 29(7)

⁹⁵⁴ ACHPR Article 29(8)

⁹⁵⁵ Lassen, in *NJIL*/1998/57/197

appears to show the relationship between forced or compulsory labour and slavery or slavery-like practices. This is also evidenced by the SSFL, which emphasises measures taken to prevent forced labour 'from developing into conditions analogous to slavery'. Similarly, the inclusion of the ILO29 in Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery Preamble also considered the potentially grave consequences of forced labour and its position in international law.

Nonetheless, the above reasoning seems not to show that forced labour is a form of slavery or servitude. These three inter-related concepts are essentially diverse in both nature and degree. Moreover, anti-slavery norms are non-derogable in any circumstances, while it is not the case for the prohibition of forced labour as has already been outlined. Such divergence is worthy of note given the close relationship that appears to exist between forced labour and slavery or servitude. The prohibition on forced labour as a potential rule of customary international law should be justified by the nature of the prohibition itself rather than because of its relation with slavery.

The key difference between the two is the fact that despite the recognition given to the forced labour in major international human rights instruments, exceptions often exist whereby the legal coverage of the prohibition is greatly reduced. One of these exceptions is hard labour as punishment for a crime, which is included in ILO29 Article 2(2), ICCPR Article 8(3)(c), ECHR Article 4(3), ACHR Article 6(2)-(3) and CMW Article 11(3). The exception of work in detention is detailed in ILO29 Article 2(2), ICCPR Article 8(3)(c)(i), ECHR Article 4(3)(a), ACHR Article 6(3)(a) and CMW Article 11(4)(a). Another is military and national service in ADRDM XXXIV, ILO29 Article 2(2), ICCPR Article 8(3)(c)(ii), ECHR Article 4(3)(b) and ACHR Article 6(3)(b). The exception of duties in emergency is regulated in ADRDM XXXIV, ILO29 Article 2(2), ICCPR Article 8(3)(c)(iii), ECHR Article 4(3)(c), ACHR Article 6(3)(c) and CMW Article 11(4)(b). Normal civic obligations are contained in ADRDM XXXIV, ILO29 Article 2(2), ICCPR Article 8(3)(c)(iv), ECHR Article 4(3)(d), ACHR Article 6(3)(d) and CMW Article 11(4)(c).

This seems to indicate the broad recognition of the prohibition of forced labour, whereas it is difficult to justify that such labour has been generally

recognized by States as law. Moreover, reports of the UN, the ILO and other intergovernmental organizations appear to 'show an unacceptable extent to which forced labour practices are still used, and their apparent link with undemocratic structures and other structural causes of gross violations of human dignity.'⁹⁵⁶ There is not sufficient evidence to suggest that States engage in a general practice of prohibiting forced labour, thereby greatly weakening any arguments that the prohibition is a rule of customary international law.

The other issue is to explore whether above socio-economic rights relating to work are customary. Firstly, the right to work, to free choice of employment, or to protection against unemployment have not been universally recognised in all of major international instruments. At least one of the three rights is found in many instruments, e.g., the UDHR, ICESCR, ESC, ADRDM, ACHPR and ILO122, and even non-derogable in cases under the ICESCR and ACHPR. Yet both ADRDM XXXVII and ACHPR Article 29(6) treat work as a duty of individuals. This appears to go against the right to work and thus defeat the customary feature of the right to work in international law.

Secondly, not all major instruments concerned recognise the rights concerning pay and conditions of work. For instance, UDHR Article 23(3), ICESCR Article 7(a)(i), ESC I, (4) provide for the right to fair pay, while others, such as the ACHPR remain silent. Unlike the UDHR, ACHPR, ICESCR and ESC, the ADRDM fails to mention the right to equal pay for equal work. Different from the ADRDM, the UDHR, ICESCR, ACHPR and ESC seems to stipulate the right to proper working conditions. The right to promotion is only prescribed in ICESCR Article 7(c). Such rights are even derogable in exceptional circumstances under the ESC.⁹⁵⁷ Such examples illustrate some of the reasons behind the non-customary character of these rights.

Thirdly, the right to rest and leisure appears to indicate the absence of general recognition in international law. While the UDHR, ICESCR, ESC and many ILO instruments contain provisions on such rights, the ACHPR makes no comparable reference. This is also derogable in certain cases pursuant to the ESC.⁹⁵⁸

⁹⁵⁶ Drzewicki, in Eide, Krause, Rosas/2001/232

⁹⁵⁷ Sieghart/1983/220

⁹⁵⁸ Ibid./224

4.11 Conclusion

International human rights law prohibits slavery or servitude without derogations, but permits several exceptions to the prohibition of forced labour. These exceptions contribute to part of the definition of forced labour, which appears to clarify when compulsory work or service is not forced labour, rather than when forced labour is permissible. Even the permissible forms of compulsory work might violate the relevant States' human rights obligations, for example, where compulsory work or service amounts to forced labour or is appointed in a discriminatory way.

Moreover, the idea of the right to work as an economic right is fundamentally incompatible with a regime of forced labour. If compulsory work or service is permitted, it must be an implied exception to the right to work. States must provide the just and favorable conditions of work in private sectors to prevent exploitation.

As a party to the ICESCR, CRC, CAT, ILO100, ILO122 and ILO182, China is obliged to faithfully fulfil the relevant human rights obligations set forth in these treaties. Specifically, China should undertake the obligation to prohibit forced labour from being subject to those under the age of 18, by the CRC and ILO182. It also has the obligation to prohibit any forms of torture, cruel, inhuman or degrading treatment or punishment without derogations or exceptions in any circumstances under the CAT and even the CRC if relating to the child. Meanwhile, its obligations contain the protection of such rights of labourer in work as the rights to non-discrimination and equality, to freely chosen work, to just and favourable conditions of work pursuant to the ICESCR, ILO100 and ILO122.

These treaty obligations involve the prohibition of forced labour and does not allow for any forms of human rights breaches concerned. In the performance of compulsory work or service, any individual instances may constitute violations of the relevant rights detailed in the above six treaties.

After the ratification of the ICCPR, China will undertake more treaty obligations concerning the prohibition of forced labour and any particular or systematic breaches of relevant human rights would not be permitted. ICCPR Article 8(3) entails for China the obligation to prohibit forced labour in principle, with certain permissible forms of compulsory work or service. These are hard labour as punishment for a crime; work in detention; military and national service;

duties in emergency; and normal civic obligations. The simple and general approach of the ICCPR appears to omit more details on the prohibition, which remains to be interpreted with reference to other relevant instruments. For instance, the ILO29, SSFL and ILO105 appear not to permit any compulsory work or service for the benefit of private sectors that might satisfy the requirements of forced labour and even servitude in the ICCPR.

Chapter V FORCED LABOUR: CHINA'S POLICY AND PRACTICE

5.1 Introduction

The situation in China concerning forced labour is that China seems to consistently execute a policy of prohibition in practice on the basis of pertinent laws⁹⁵⁹. Permissible forms of compulsory work or service potentially exist in detention for re-education. It relates to two kinds of 'lawful' systems, namely, RTL and RETL. Both systems contain the same compulsory element in labour as a legal obligation of criminals under RTL or offenders undergoing RETL during their detention for re-education.

Article 46 of the 1997CL stipulates RTL, such that any criminal 'who is sentenced to fixed-term imprisonment or life imprisonment' shall serve his term either in the prison or another place stipulated 'for the execution'. 'Anyone who is able to work shall do it to accept education and reform through labour.'⁹⁶⁰ Article 69 of the 1994PL also provides that any criminal 'who is able to work shall do labour'. RTL is a means by which to enforce criminal detention, fixed-term imprisonment, life imprisonment and the death penalty with a suspension of execution to educate and reform criminals serving sentences involving the above sanctions.⁹⁶¹ Since RTL results from criminal sanctions imposed or passed by competent courts and according to the 1997CL, this compulsory work seems to be the permissible form required by ICCPR Article 8(3)(b) and not forced labour prohibited by ICCPR Article 8(3)(a).

Nonetheless, it is RETL that might conflict with the provisions of the ICCPR and other human rights instruments concerned. This unique system has undergone approximately 50 years' development in the Chinese judicial systems. Without a clear official definition, Chinese scholars usually describe it in a variety of ways and have presented some generally accepted views⁹⁶² according to the current legislation of China. At present, offenders subject to RETL are usually those who are above the age of 16 and whose illegal acts or petty crimes are 'not serious

⁹⁵⁹ They include 1994LL Articles 3, 96, 1997CL Article 244

⁹⁶⁰ 1997CL Article 46

⁹⁶¹ Ma Jihong, in *JGPOVC*/2003/4/52; Xinhuanet 19

⁹⁶² Wang Hengqin/2003

enough for criminal punishments',⁹⁶³. After RETL Administrative Committees examine and approve RETL decisions, control offices of RETL take them in to educate them through labour for one to three years, with an additional year if necessary.⁹⁶⁴ As a special punishment decided by the administrative departments for justice, it entails depriving persons undergoing RETL of personal liberty for not less than one year,⁹⁶⁵ similar to RTL, and so, in this respect, appears to be a harsh penalty.

This chapter will examine both systems in detail, from the standpoint of official opinions and arguments by the international community. Revolving around the relevant disagreements between the Chinese Government and external bodies, both the relevant legislation and practice will be addressed in a systematic and comprehensive approach. This appears to manifest the present policy towards forced labour that China is carrying on and whether RTL or RETL is coherent with international human rights instruments concerned.

5.2 The Chinese Policy of Forced Labour

In order to obtain a clear idea of the Chinese policy towards forced labour, it is necessary to examine official opinions found in documents of the Chinese Government where possible. This is the usual way to establish a State's view on a particular subject. Accordingly, the Chinese viewpoint and defence against criticisms from external bodies will be explained in order to precisely unravel China's policy towards forced labour.

5.2.1 Official Opinions on RTL and RETL

5.2.1.1 RTL

As WPs indicated, RTL is a system that 'China has criminals do productive and socially beneficial work' and combines 'punishment and reform',⁹⁶⁶ in order to transform them into law-abiding citizens through labour.⁹⁶⁷ China faithfully practices RTL as a method to reform and educate them to gradually do

⁹⁶³ Chen Zexian, in Liu Hainian/1999/30; Zou Keyuan, in *CLF*/2001/12/460

⁹⁶⁴ Zhao Bingzhi, Chen Zhijun, Wan Yunfeng, Liao Wanli, in Zhao Bingzhi/2003/514

⁹⁶⁵ Jiang Jinfang, in Chu Huaizhi, Chen Xingliang, Zhang Shaoyan/2002/281

⁹⁶⁶ CHR 6/[III].

⁹⁶⁷ Xiao Yang/1996/136-137

conscientious work, but opposes using such labour to merely punish them or hard labour to maltreat them. This helps them realise 'no work, no food' in the mind, have a hardworking character and a sense of social responsibility, and improve both knowledge and skills.⁹⁶⁸

Prisons fully respect and protect prisoners' labour according to the relevant laws and regulations. They not only ensure that prisoners have the same benefits 'as employees of State enterprises in terms of work hours, holidays, supply of food and edible oil, and occupational safety and health care'⁹⁶⁹, but also praise and reward them in achievement exhibition meetings.⁹⁷⁰ With the implementation of a series of the prison labour legislation,⁹⁷¹ prison work has been made enormous achievements in terms of prison management, safety precaution and the quality of reforming prisoners.⁹⁷² Meanwhile, their legitimate rights and interests, especially the right to rest on statutory festivals and holidays, and the right of labour insurance, are properly guaranteed in accordance with the law.⁹⁷³ Prisons also supply juvenile delinquents with both necessary conditions for their compulsory education and special treatment, and the particular reform principle of 'relying mainly on reform through education supplemented by light physical labour'.⁹⁷⁴

Since the establishment of the PRC, RTL institutions have turned the overwhelming majority of criminals, including the last emperor of Qing Dynasty and prisoners of the WWII, into law-abiding citizens and qualified personnel helpful to national developments. This has played an important role in preventing and reducing crimes, consolidating people's democratic dictatorship regime, and have contributed to safeguarding steady politics and social security and building a harmonious society.⁹⁷⁵

5.2.1.2 RETL

⁹⁶⁸ Zhang Xiufu/2000/175-177; HRC1991; CHR 6

⁹⁶⁹ CHR 6/[III]

⁹⁷⁰ Zhang Fengxian, in Xia Zongsu & Zhu Jimin/2001/310

⁹⁷¹ *Legal Daily I*

⁹⁷² Ibid.

⁹⁷³ CPHR2003

⁹⁷⁴ CHR 6/[III]

⁹⁷⁵ Ibid.

According to the Human Rights in China⁹⁷⁶, the nature of RETL is ‘an administrative punishment’ on the basis of the Decision of the State Council Regarding the Question of Rehabilitation Through Labour, approved on 1st August 1957, and the relevant regulations adopted by the Standing Committee of the NPC. Under the supervision of the PPs, RETL is managed by the RETLACs ‘set up by the people’s governments of various provinces, autonomous regions, municipalities as well as large and medium-sized cities’⁹⁷⁷. It is stipulated that ‘those eligible for’ RETL ‘should meet the requirements of relevant laws and regulations’ and that decisions of RETL are ‘made through a strict legal procedure’.⁹⁷⁸

Offenders undergoing RETL are entitled to enjoy legal rights and freedoms, inclusive of procedural, political, and civil rights, under the 1982 Constitution and relevant laws on RETL. For instance, they have the procedural right to be informed of the reasons for, and the period of, their programmes, together with two alternative means for appealing decisions. They may appeal to RETLACs for review or lodge a complaint with the PC by laws if taking exception to these decisions.⁹⁷⁹ Moreover, other rights mainly encompass the right to vote,⁹⁸⁰ to ‘take time off during festivals and holidays’, ‘to meet with their family members’, to ‘live together with their spouses during visits’ and ‘the freedom of correspondence’.⁹⁸¹

Under the guidance of ‘the policy of educating, persuading and redeeming the offenders, with the emphasis on redeeming’, RETL institutions provide them with open classes, assigning instructors so they can have ‘systematic ideological, cultural and technical education’.⁹⁸² The offenders can work a maximum of ‘six hours every day’, and the original term of their programmes may be reduced in the case that they have shown themselves, through good behaviour, to have been reformed. It was reported that about half of the people undergoing RETL ‘are released ahead of time’ every year.⁹⁸³ Annually, an average of about 50,000 people who have been reeducated under RETL, ‘the overwhelming majority’ of them

⁹⁷⁶ HRC1991/[IV]

⁹⁷⁷ Ibid.

⁹⁷⁸ Ibid.

⁹⁷⁹ Ibid.

⁹⁸⁰ Ibid.

⁹⁸¹ Ibid.; PD 2; HRC1991

⁹⁸² HRC1991

⁹⁸³ Ibid.

‘have turned over a new leaf’, with ‘only 7 percent of those released’ found to ‘have lapsed into offence or crime’.⁹⁸⁴ Therefore, this system is highly effective in turning ‘those who have dabbled in crime’ into ‘constructive members of society’, and has played an important role ‘in forestalling and reducing crime and maintaining public order’.⁹⁸⁵

5.2.2 The Controversy on Both RTL and RETL

As ‘a sore spot’ of China’s human rights discussion ‘with the outside world’⁹⁸⁶, RTL and RETL systems have been universally condemned by the international community⁹⁸⁷. The controversy between the Chinese Government and external bodies focuses mainly on three aspects, both systems themselves, the labour conditions for both criminals and persons undergoing RETL, and the export of products made through forced labour.

Specifically, RETL and RTL have been condemned as donkeywork, or as merely the tool against dissenters.⁹⁸⁸ Moreover, torture and other forms of maltreatment are alleged to be prevalent practice in RETL or RTL institutions.⁹⁸⁹ As a response, the Chinese Government argues that this system is not designed to punish but simply to reform and re-educate offenders through labour, under universal, just and authentic protection of human rights.⁹⁹⁰ The condemnation results from the confusion of RETL with the punishments of forced labour before liberation. There are several important points which require further analysis.

The first is concerned with the understanding of labour itself. According to Marxist views, labour can change the existing form and nature of natural things and thus transform them into social wealth as a basic practical activity. This contributes to distinguishing human beings from animals and underpins the formation of human society.⁹⁹¹ The participation in productive labour is advantageous in remoulding consciousness to accept the principle of ‘no pain, no gain’, and encourages people to respect others’ work and cherish social wealth. Additionally,

⁹⁸⁴ Ibid.

⁹⁸⁵ Ibid.

⁹⁸⁶ OYCF; WPSW; Zou Keyuan, in *CLF*/2001/12/483

⁹⁸⁷ R-US

⁹⁸⁸ HRIC; WJF; BDHRL 5, 7; OYCF; HRW 2; AFAR 1-2

⁹⁸⁹ AI 2-3, 36-38; Hung, in *CJTL*/2003/305; Pejan, in *HRB*/2004/22; AFAR 2

⁹⁹⁰ Jin Jian/1997/576; Hu Ming, in *JFPS*/2002/69

⁹⁹¹ Zhang Fengxian, in Xia Zongsu & Zhu Jimin/2001/321

under the 1982 Constitution, '[W]ork is the glorious duty of every able-bodied citizen'.⁹⁹² This indicates the essential aim of socialism, which is to finally eliminate exploitation. Hence, every able-bodied citizen, inclusive of offenders with Chinese nationality, must perform one type of labour or another by Chinese law.

Secondly, Western countries explicitly prescribe labour as a legal right or merely regard it as a virtual right without related legal statements, whereas Chinese laws regulate the obligation on labour. Thus, offenders may be compelled to participate in labour. In practice, the type and duration of the productive labour are chosen with great care for the reformation of offenders.

Thirdly, China was accused of imposing forced labour on criminals or persons undergoing RETL outside any judicial process⁹⁹³, against ICCPR Articles 8(3), 9 and 14⁹⁹⁴. The recipient of a RETL sentence 'has no right to a hearing, nor right to counsel, and no right to any kind of judicial determination of his case'.⁹⁹⁵ RETL system lacks 'any kinds of procedural restraints', uses 'reeducation to incarcerate political and religious dissidents', and has difficulty in appeal.⁹⁹⁶ The 'retention for in-camp employment' related to RETL system may permit authorities 'to keep prisoners in the camps after the expiration of their sentences'.⁹⁹⁷ In answer to these, the Chinese Government rejected the allegation as a groundless fabrication because China's prisons and RETL institutions 'receive, strictly according to law, criminals sent to them to enforce sentences passed by the courts'.⁹⁹⁸

Moreover, it is alleged that 'conditions are harsh and the work load heavy' with the People's Armed Police on guard at RETL institutions, especially, in certain 'mines and brick factories'.⁹⁹⁹ In RETL camps, 'sleep and food deprivation, filth, stench, beatings, heat, cold, and toxic odors are daily routines'.¹⁰⁰⁰ Yet it was refuted that inmates' work time and intensity are less than the social average standard, a system for safe production has been established to avoid industrial

⁹⁹² 1982 Constitution Article 42

⁹⁹³ AI 2-3; BDHRL 7

⁹⁹⁴ AI 36

⁹⁹⁵ HRW 1, 3

⁹⁹⁶ Ibid.

⁹⁹⁷ HRW 1, 3

⁹⁹⁸ CPHR2003

⁹⁹⁹ HRW 1, 3

¹⁰⁰⁰ AFAR 2

accidents, and inmates' living standards are commensurate with the average of local residents.¹⁰⁰¹

Furthermore, it was claimed that China's RTL and RETL camps were 'the backbone of its penal system and a significant component of its economy'.¹⁰⁰² Some private companies 'began allocating contracts to labor camps and prisons' and exporting products from 1990s.¹⁰⁰³ In response to this, the Chinese Government denounced that the products produced by prison labor are mainly used to meet needs within RTL or RETL systems in China, and profits from such labour mostly contribute to 'maintaining production', 'improving their living conditions' and 'upgrading their common living areas and facilities'.¹⁰⁰⁴ 'This has played a positive role in reducing the burden' on both the State and people¹⁰⁰⁵, while it is merely a small part of China's annual output from industry and agriculture¹⁰⁰⁶.

5.3 The Practice

The examination of RTL and RETL is favorable to explore China's present practice on forced labour in order to assess its relevant policy and compliance with international human rights law. On the common constitutional basis, the difference between the practices of both systems and human rights standards concerned will be specified in the following respects.

5.3.1 The Common Constitutional Basis in Legal Practice

Since both RTL and RETL concern work and labour, their common constitutional basis is Article 42 of the 1982 Constitution, which stipulates that work is the right and 'glorious duty of every able-bodied citizen.' This means that work is a constitutional right and duty of Chinese citizens so that every able-bodied citizen has the obligation on the work, regardless of whether citizens are willing or not. This is diverse from the provisions on the right to work in the ICCPR and ICESCR.

¹⁰⁰¹ Jiang Jinfang, in Chu Huaizhi, Chen Xingliang, Zhang Shaoyan/2002/39-40

¹⁰⁰² TJC

¹⁰⁰³ AFAR 2

¹⁰⁰⁴ Xia Zongsu/2001/28

¹⁰⁰⁵ Ibid.

¹⁰⁰⁶ Xia Zongsu & Zhu Jimin/2001/294; CHR 6

Pursuant to ICCPR Article 8(3)(a), the State parties are obliged not to compel them to work with all positive measures, including legal ones. The right to work is optional and does not necessarily imply the duty to work, which is compulsory in nature. Meanwhile, ICESCR Article 6(1) also provides for the right to work, comprising the individual's claim or opportunity 'to gain his living by work which he freely chooses or accepts'. Hence, the general duty to work that could be imposed with a penal sanction by States tends to constitute forced or compulsory labour against ICCPR Article 8(3)(a) and ICESCR Article 6(1).

Despite that, the above constitutional clause was reasonable under the circumstances of the planned economy as a historical result. From the establishment of a market economy in the 1980s, it has had an increasing tendency to demonstrate a series of shortcomings inconsistent with the contemporary China.

Early in 1952, the Decision on the Issue of Work Employment provided for the policy on the general assignment and work employment, which appears to deem the right to work as the right to require the State to offer each citizen employment. Further, the Constitution of the PRC in 1954 tends to take the means of planned management to ensure the right of citizens to obtain employment in Article 91. With the socialistic alteration finished in 1956, a labour system under the planned management was gradually established to pertain to planned economic system. The highly concentrated management system guaranteed every able-bodied citizen to take up an occupation without the menace of unemployment and prohibited a random floating work force. Hence, the right to work became a right to be guaranteed work but this also involved a duty to work without the freedom to choose. This was evidenced by both the principle of distribution according to work in Constitution of the PRC in 1975 Article 9 and 'glorious duty of every able-bodied citizen' to work in Constitution of the PRC in 1978 Article 10 and 1982 Constitution Article 42.

On the one hand, these provisions on the duty to work contributed to the good social order, the equality of everyone in the sense of equalitarian ideas, and the stable living of citizens. The labour system was able to successfully avoid the disordered state under the market economy and result in the good order of society. Since the State undertook the obligation to assign every citizen to obtain some form of employment, citizens really enjoyed the equal right to obtain it and even

the equalization of income. Without risk of unemployment or bankruptcy, every citizen had stable work and income for a peaceful life. A belief that 'socialistic society means that everyone has food and work' had been generally accepted by the public in China.

On the other hand, they tend to lead to theoretical disorder, practical difficulty, and inconsistency among legal systems. Such negative influence may be addressed in detail as follows.

Firstly, the legal duty is compulsory and the legal right is optional in theory. If work is a right, citizens can choose it or give it up at will. If work is a duty, citizens must fulfil their own legal obligations; otherwise they have to be punished. Both difference and contradiction appear not to give rise to work as both a right and duty. Moreover, neither the Constitutions of China nor other laws provided for any sanctions against those able-bodied citizens that fail to participate in labour market. In fact, with the system of market economy gradually established and improved, the means of distributing income to every citizen are diverse because citizens can gain personal economic income through saving interests, bonus stock, bonus, and even inheritance. These means are beneficial complements of the way of distribution according to work, and there is no citizen to suffer any punishment for their benefit from them.

Secondly, the present situation tends to leave no room for work as a legal duty of citizens for two primary reasons. At present, the size of the work force in China is of such a scale that it is impossible to find work for every citizen at the same time. Under the circumstances of a market economy, a certain unemployment rate is retained to promote competition and improve efficiency, and thus it is impractical to ensure the employment of every citizen.

Thirdly, two points are worthy of note concerning legal conflicts among legal systems. One point is that the duty to work by every citizen is inconsistent with the retiring system enshrined in 1982 Constitution Article 44. This system applies to retired employees in corporations and enterprises or officials in national organizations. Since they retire due to their ages rather than work capacity, lots of able-bodied citizens whose ages reach the retiring point must leave work positions according to the retiring system so as not to continue fulfilling their duties. The system is designed to allow them to have a rest and to peacefully spend their late

years, whereas the 1982 Constitution requires all able-bodied citizens to continue participating in work and this tends to deprive them of right to retire. The other is easily to confuse the duty to work with that of criminals to labour. As indicated in 1994PL Articles 7(2) and 69, to participate in labour is the legal obligation of every able-bodied criminal and a compulsory means of the State to compel criminals to reform themselves through labour. This special duty of criminals is similar to, and blurred its difference with, provisions on the universal duty of citizens to work. In fact, the duty to work is at the civil level, universally applicable to all able-bodied citizens in China. Differently, the duty of persons undergoing RTL or RETL is at the criminal level, which only applies to able-bodied ones subject to RTL or RETL, as indicated in 5.3.2 and 5.3.3.

Furthermore, it is unlikely that nobody will participate in work, even if the 1982 Constitution cancels the legal duty of work, for several primary reasons. Firstly, in most States, Constitutions emphasize the right of citizens to work without explicit regulations on the duty to work. There is never such phenomenon that no citizens do work in these States.

Secondly, in history, there are neither express provisions on the duty to work in the 1954 Constitution, or 1975 Constitution, nor the above phenomenon to appear. In fact, work has become the practical needs of most Chinese citizens. Specifically, work is the essential and primary means for the majority to live, develop, and to seek social welfare. The abolition of the exploitation system and the negative attitude towards all forms of unearned income means that most citizens are willing to do some work as the primary means to maintain their own subsistence, development, and welfare. Moreover, quite a lot of citizens regard work as the content, form, and interests of their lives and are unwilling to give up work because it contributes to realizing the value of life and acquiring a happy life.

Thirdly, it is a moral idea that citizens should work for both social development and States' richness in China. They also take cognizance of the correlation between public interests of States and personal interests of citizens. This moral idea and strong awareness render citizens to do work, even if the 1982 Constitution abolished citizens' duty to work.

Fourthly, some unearned income of citizens tends not to have any direct harm to the State, society and others. Thus, it is not necessary to resort to legal means to solve this problem.

In brief, the constitutional provision is not essential, reasonable, or feasible to stipulate work as a legal obligation of Chinese citizens, and thus work should not be determined as a legal duty of such citizens. Together with legal conflicts with both the ICCPR and ICESCR, the common constitutional basis of RTL and RETL should be revised as the right to work in uniformity with the above international human rights instruments.

5.3.2 Practices of RTL

5.3.2.1 General

Before 1994, the main legal basis of RTL was the Regulations on Reform through Labour of the PRC in 1954, which entitled RTL to emphasize the importance of RTL in reforming prisoners as a measure. With the promulgation of the 1994PL to be, however, RTL was literally replaced with RTE, including RTL and three other means, which are designed to correctly ‘punish and reform prisoners, and prevent and reduce crimes’.¹⁰⁰⁷ Together with 1997CL Article 46, the above constitutes the primary legal bases of RTL, which mainly covers a series of regulations as follows.

As the State organs for executing criminal punishments, prisons and other RTL institutions apply the principle of combining punishment with reform and education through labour in implementation,¹⁰⁰⁸ so as to transform criminals into law abiding citizens.¹⁰⁰⁹ Specifically, prisons execute the death penalty with a two-year suspension of execution, life imprisonment, or fixed-term imprisonment; detention houses instead execute fixed-term imprisonment, ‘if the remaining term of sentence is not more than one year’ before being handed over for execution; criminal detention is mainly executed by public security organs in its detention houses, pursuant to 1996CPL Article 213. Juvenile delinquents execute their criminal punishments and perform labour for education and reform in remand homes.

¹⁰⁰⁷ 1994PL Article 1

¹⁰⁰⁸ 1994PL Article 3

¹⁰⁰⁹ 1994PL Article 2

According to the 1994PL, education and reform of prisoners involve the principles of ‘suited education to different persons’¹⁰¹⁰, ‘suited education to different types’¹⁰¹¹, and ‘persuading prisoners through reasoning’¹⁰¹². Meanwhile, the present reform contains ideological education,¹⁰¹³ cultural education¹⁰¹⁴, occupational and technical education¹⁰¹⁵ in content, with such methods as combination of collective and individual education and of education inside prison and social education.¹⁰¹⁶ Similarly, detention houses compel convicted criminals into performing productive labour and impose political education on them.¹⁰¹⁷ Additionally, unconvinced persons may be organized to perform appropriate labour under the circumstance of no impediment for investigation or trial,¹⁰¹⁸ where such labour is not forced or compulsory.

It is worthy to be mentioned several points on the difference between RTL and RETL. The first is the nature of punishments. RTL is related to criminal punishment imposed for criminal offences, but RETL is administrative punishment imposed for petty crimes and illegal acts, the degree of which has not reached the level of criminal punishment. The second is executive bodies. Prisons, detention houses and remand homes are responsible for implementing RTL, whereas the control offices of RETL are RETL intuitions. The third is executive bases. RTL is implemented on the ground of sentences rendered by competent courts, while RETL is carried out in pursuance of decisions made by police in the name of RETLACs.

5.3.2.2 Violations of International Human Rights Instruments

5.3.2.2.1 *Forced Labour*

¹⁰¹⁰ The principle of ‘suited education to different persons’ refers to take different measures to educate and reform offenders in the light of their different characteristics and conditions.

¹⁰¹¹ It means to take different measures to educate and reform offenders according to the type of criminal punishment imposed on each offender. .

¹⁰¹² It means to focus on educate offenders and prohibit administrating or controlling them in a simple and crude way.

¹⁰¹³ 1994PL Article 62

¹⁰¹⁴ Ibid.

¹⁰¹⁵ 1994PL Articles 64 and 65

¹⁰¹⁶ 1994PL Article 63

¹⁰¹⁷ 1990R-DH Article 9

¹⁰¹⁸ Ibid.

As stated above, RTL seems to conform with the permissible form of compulsory work or service indicated in ICCPR Article 8(3)(b), and so does not fall within the category of forced labour. But this is not the case for two reasons.

First, in all cases, there will be no express statement on performance of any labour or service in the sentence rendered by a competent court. This creates uncertainty and therefore does not satisfy the permission given in Article 8(3)(b). There is no sentence by a competent court to express such punishment as labour in the practice of RTL. Even standard samples in judicial documents are short of a clear statement on RTL as punishment.¹⁰¹⁹ Meanwhile, neither legal provisions nor academic papers require the court sentence to explicitly affirm this labour as punishment.

Second, RTL institutions tend to assign productive tasks according to criminals' practical conditions, in order to meet the requirements of reform in enforcement or employment after their release. According to the 1994PL, prisons rationally organize prisoners to participate in labour in the light of their individual conditions.¹⁰²⁰ The reform on juvenile delinquents shall conform to their characteristics and favour improving an elementary education and work skills.¹⁰²¹ Meanwhile, a prison shall make reference to the State's relevant regulations on working hours to decide them for prisoners and ensure the right to rest on statutory festivals and holidays, despite some possible adjustments under special circumstances.¹⁰²² Hence, such labour appears not so 'hard' as 'the classical forms of forced labour in work colonies or camps'¹⁰²³.

Moreover, RTL tends not to belong to any exceptions of forced labour in ICCPR Article 8(3)(c). Despite that RTL is a kind of work or service required of detainees during the detention, this punishment appears not to be explicitly stated in a 'lawful order of a court' as the exception enshrined in Article 8(3)(c)(i), not to mention others in Article 8(3)(c).

Therefore, RTL tend not to fall within the legal exceptions protected, but to be forced labour prohibited, by ICCPR Article 8(3).

¹⁰¹⁹ China Court 2

¹⁰²⁰ 1994PL Article 70

¹⁰²¹ 1994PL Article 75

¹⁰²² 1994PL Article 71

¹⁰²³ Nowak/1993/152

5.3.2.2.2 Other Violations

In China, the prison system has both functions, namely, supervision and reform of criminals, and production of economic efficiency for historical reasons.¹⁰²⁴ Despite that the State safeguards funds pursuant to the 1994PL and financial provisions from the State are annually on the increase, they seem not to meet all practical needs for prison work. Thus, many RTL institutions signed contracts with their enterprises in order to further develop economy to complement deficit with productive interests.¹⁰²⁵

It seems that criminals undergoing RTL are placed at the disposal of private parties, rather than 'under the supervision and control of a public authority'.¹⁰²⁶ This is against ILO29 Article 2(2)(c) and the State's obligation to prevent them from such practices in ICCPR Article 8(3)(b). However, it is not true in fact. As 1994PL Article 2(1) stated, prisons are the State organs to execute criminal punishments. Together with other RTL institutions, prisons are responsible for implementation of criminal sanctions, including supervision and control of criminals who take part in labour. Pursuant to 1954R-RTL Article 30, productive profits from RTL should serve for State economic construction, and thus appear to be mainly used to complement the deficit with poor State provisions.

The situation of criminals in China appears not to consist with the nature of prisons as a body to execute criminal punishments enshrined in the 1994PL, and to deviate from the essential aim of RTL protected by ICCPR Article 10(3). This also tends to result in a series of disadvantages in the present management of prisons as follows.

First, some RTL institutions force criminals to do overtime or highly intensive labour under the financial pressure.¹⁰²⁷ Since 1994PL Article 71 permits to adjust labour time under special circumstances, leaving a room for its arbitrary expansion, prisons are likely to expand labour time while encountering financial difficulties. In practice, the labour intensity and expansive time are increasing without maximum limits because productive labour quotas are quite high and some prison labour is

¹⁰²⁴ Feng Jiancang, in *JC*/2004/37

¹⁰²⁵ *Ibid.*

¹⁰²⁶ ILO29 Article 2(2)(c)

¹⁰²⁷ Jiang Weiren, in *ZYF*/2004/151

comparatively hard. This tends to occupy necessary time for education and reform activities and influence the right to rest and entertainment.¹⁰²⁸ Hence, the above provisions run contrary to ICESCR Article 7.

Second, prisoners are merely able to acquire limited labour remuneration. 1994PL Article 72 stipulates that prisons should pay labour remuneration to prisoners that participate in productive labour according to relevant provisions, while this fails to be implemented in practice as it should be by law. Some prison officials still remain the traditional ideas that RTL is punitive and prisoners should not obtain any remuneration from their punitive labour. In addition to insufficient funds, most prisons fail to pay labour remuneration in the form of wage,¹⁰²⁹ and thus prisoners generally acquire material objects, money awards and pocket money.¹⁰³⁰ It appears not to be practical wages,¹⁰³¹ but slight economic compensation, which is much less than the remuneration that prisons should pay and probably different among diverse prisoners who do the same labour. This tends to go contrary to ICESCR Article 7(1).

Third, labour conditions cannot satisfy the requirements of due standards and prisoners' productive safety lacks necessary protection in some prisons. 1994PL Article 72 requires certain protection relating to prison labour, whereas not all prisons effectively implemented the systems on labour safety in fact. Even some prisons have to organize prisoners to perform labour outside, which increases the possible number of unexpected accidents in the performance of labour.¹⁰³² This also tends to go contrary to ICESCR Article 7.

Fourth, both labour insurance and compensation appear inadequate. 1994PL Article 73 provides for the compensation for injuries or death in labour of prisoners in reference to relevant regulations on national labour insurance. This tends to be mistakenly regarded as an optional provision so that some prisons failed to fully carry it out in according to judicial practice. By the above provisions, the amount of damages should be quite high, while lots of prisons claimed no sufficient fund and had to pay less in implementation, without referring to them.¹⁰³³

¹⁰²⁸ Feng Jiancang, in *JC/2004/45*

¹⁰²⁹ *Ibid.*/46

¹⁰³⁰ *Ibid.*

¹⁰³¹ Liu Jian & Cai Gaoqiang, in *JHJPVC/2004/10-14*

¹⁰³² Feng Jiancang, in *JC/2004/45*

¹⁰³³ *Ibid.*

Fifth, some officials of RTL institutions cannot properly apply the principle of equality and justice to criminal punishments in implementation.¹⁰³⁴ Apart from the 1996CPL, 1997CL Article 4 regulates the equal application of laws to citizens. However, prisons tend to welcome convicts with some professional skills, and refuse to accept the elder, the weak, the ill and the disabled,¹⁰³⁵ considering improvement of economic efficiency. Even worse, some criminals may be approved for reduction of their sentences just to have access to productive business or presenting books and other properties. This tends to deviate from requirements in ICESCR Article 2(2).

Sixth, there are, albeit rare, phenomena of torture, cruel, inhuman or degrading treatment. According to a questionnaire investigated by the Standing Committee of a province in 2004 from news, 2% of persons serving jail sentences held that there are such cases that policemen beat or mistreat prisoners in prisons in recent years.¹⁰³⁶ It was also reported that prison bullies or insufficient medical service in prisons correspondingly accounts for 97% and 96%.¹⁰³⁷ This incomplete statistic data appear to not only directly indicate the relevant situation in a province, but also indirectly show the national tendency of China in this respect because of frequent reports in official publications.

A good example is a newly reported Case *Wang Yanlin*. He has become a disabled person with injuries in his left arm because other inmates beat him in July 2005 and with a serious paralysis due to shortage of effective medical service to cure his illness during 10 years' imprisonment in a prison till 2005.¹⁰³⁸ The behaviour of policemen by beating or mistreating prisoners, of prison bullies, and the unsatisfactory medical service, respectively constitute torture, cruel, and inhuman treatment, in breach of CAT Articles 2, 6 and ICCPR Article 7.

5.3.3 Practices of RETL

Among the various legal forms of current legislations on RETL, the 1957D-RETL, Supplementary Provisions of the State Council for Rehabilitation Through Labour,

¹⁰³⁴ Ibid.

¹⁰³⁵ Ibid./160

¹⁰³⁶ JCRB 1

¹⁰³⁷ Ibid.

¹⁰³⁸ China Court 3

approved on 29th November 1979, Trial Method on RETL issued in 1982, and Regulations on Public Security Bodies Handling RETL Cases are the primary legal bases of RETL. Since the applicable scope of RETL appears wider and wider in order to meet so-called objective requirements, the 2002R-RETL tends to expand to all intentional illegal acts not falling within the scope of current criminal punishments. At present, offenders on the programme of RETL are usually those who are above the age of 16 and whose illegal acts or petty crimes are ‘not serious enough for criminal punishments’.¹⁰³⁹ With the difference between both conducts, it might as well be addressed in two-pronged approach.

5.3.3.1 Petty crimes

Among those that form the basis of a RETL order, petty crimes are criminal conducts, despite that they are not serious enough for criminal punishments. They tend to have several primary features as follows.

(1) Decisions made by administrative departments for justice

Once RETLACs have examined and approved RETL decisions¹⁰⁴⁰, control offices of RETL will take in the offenders concerned to educate through labour for one to three years, with possibility of an additional year if necessary. Thus, it is a special punishment decided by administrative departments for justice, rather than a sentence made by a competent court.

(2) No determination of a criminal charge

Moreover, this imposition of RETL tends to but fails to constitute the determination of a criminal charge. It could be analyzed from two perspectives, namely:

On the one hand, RETL appears to be a criminal sanction, because of its severity and so, in this respect, imposing it on persons involved seems to constitute the determination of a criminal charge.

¹⁰³⁹ 1957D-RETL No.1; 1982TM-RETL Article 10; 2002R-RETL Article 9

¹⁰⁴⁰ 2002R-RETL Article 2

Since this system infringes on the right to personal liberty, the length of its term and the treatment during this term appear to be primary factors in weighing its degree of severity. According to the 1997CL, the term of ‘criminal detention shall be not less than one month but not more than 6 months’ and that of ‘public surveillance shall be not less than three months but not more than two years’. Compared with two kinds of criminal punishments, the legal minimum term of RETL is twelve times the minimum term of criminal detention and four times that of public surveillance. Its legal maximum term is four times that of criminal detention and twice that of public surveillance. Hence, from the length of the term, this system is much severer than both criminal detention and public surveillance.

Furthermore, the treatment of persons undergoing RETL is inferior to those under public surveillance and detention as criminal punishments for several reasons. As an open penalty, public surveillance only partially restricts personal freedom and is carried out locally, nearby the neighborhood of convicted persons. People sentenced to criminal detention are detained in a place in the neighborhood and allowed to return home once or twice every month. Yet people under RETL are tightly guarded in special institutions and can be conditionally permitted by the institutions to go home on festivals or holidays. In addition, “one day in administrative detention” or “custody shall be considered one day of the term decided”, similar to provisions on criminal detention in 1997CL Article 44. But it is different from those on public surveillance, which is the lightest criminal punishment in 1997CL Article 41, about which it states that “one day in custody shall be considered two days of the term sentenced.”

Additionally, both RETL and RTL may bring similar legal consequences in sentencing subsequent criminal punishments. The Decision on Handling Convicts undergoing RTL and Persons undergoing RETL with Escape or Repeat Offenses in 1981, specified RETL as legal circumstances in sentencing heavier punishments. This is actually to treat repeat offenders equally with recidivism in criminal laws in respect of sentencing.

Meanwhile, on the practical level, some abnormal phenomena also indicate the imbalance of severity between RETL and criminal punishments. In cases of complicity, principal or adult offenders may be sentenced to light criminal punishments for periods shorter than several years of RETL subject to accessory or

juvenile offenders. This appears not to protect or educate but to punish minors more severely, as the term of RETL is much longer than that of criminal punishments. It is no wonder that offenders prefer criminal punishments of short terms for crimes to RETL for illegal acts and this severe punishment of RETL thus works against the aims of education and reform. Therefore, the severity of RETL far exceeds that of criminal detention, not to mention public surveillance.

On the other hand, the procedure of RETL lacks a proper trial and leaves no room for a criminal charge. According to the Law on Administrative Punishments adopted in 1996, administrative organs should inform both parties of relevant facts, reasons, legal bases and rights in examination, involving the right to request a hearing for decisions. It seems that the offender has the chance of defending himself or herself before the decision-making stage.

However, there is no such provision in regulatory documents on RETL until the 2002R-RETL. According to its Article 25, the public hearing mainly applies to RETL cases with the possible term of RETL decisions for no less than two years, or with juvenile suspects. It also precludes offenders who organize or use superstitious cults to commit illegal or unlawful acts and those who inject or ingest drugs. It seems that the long period of RETL is applicable to only petty crimes punishable by RETL, while not all these crimes have the possibility to apply RETL for two years or more and thus are held in a public hearing, without a detailed guideline to determine terms.

Even if individuals attend a hearing, it is police that hear RETL cases to make decisions in the name of the RETLACs. This is far from the requirements of 'a sentence.....by a competent court' or 'a lawful order of a court' in ICCPR Article 8(3). Hence, there is no such proper criminal trial that satisfies ICCPR Article 14 to really constitute the determination of a criminal charge.

(3) Potential violation of the ICCPR

Regardless of whether RETL has proper criminal trial or not, it always tends to violate the prohibition of forced or compulsory labour in ICCPR Article 8 for several reasons.

First, this system requires the combination of political education and productive labour under strict disciplines during a certain period¹⁰⁴¹. If persons undergoing RETL refuse to obey disciplinary measures on forced labour, further punishment may be imposed, which may include deduction of relevant payment, warning, demerit, or expanding its period. Thus, it conforms to the general definition of forced or compulsory labour.

Second, RETL tends not to be hard labour as punishment for petty crimes. It is not hard labour because persons undergoing RETL mainly do labour on labour-intensive, simply-operated agriculture, handicraft, working and building materials industries, of which the kind or quota is assigned in the light of their sexes, ages, physical powers and technical conditions¹⁰⁴². Although such labour is the punishment for petty crimes, the way to impose it is not criminal conviction by a competent court on the basis of a law expressly providing for it, but simply administrative decisions without explicit punishment on.

Third, RETL is really not 'work in detention', as its basis is not 'a lawful order of a court' 'in accordance with such procedure as are established by law'. Here 'law' means national laws formulated by the State legislature, but administrative decisions are made by RETLACs according to non-national laws by other bodies. Under the 1982 Constitution, Legislation Law of the PRC Article 8 stipulates that 'only national laws may be enacted' 'by the NPC and the Standing Committee thereof' 'in respect of matters relating to' 'compulsory measures' 'involving restriction of personal freedom'. Since no regulatory documents on RETL relating to 'personal freedom' were formulated 'by the NPC and the Standing Committee thereof', all legal bases of RETL tend to go against the 1982 Constitution and 2000LL. Hence, the legal bases involved appear to be actually ineffective.

Since the punitive feature of RETL precludes it from military and national service, duties in cases of emergency, and normal civic obligations, RETL tends not to fall under exceptions in the Article 8(3)(c), but to be really forced labour.

Furthermore, RETL constitutes forced or compulsory labour because of its constitutional basis, apart from the improper procedure and insufficient legal bases.

¹⁰⁴¹ 1982TM-RETL Article 28

¹⁰⁴² 1982TM-RETL Articles 39-40

As the above indicated, 1982 Constitution Article 42 violates the prohibition of forced labour under ICCPR Article 8(3)(a) and the right to work in ICESCR Article 6(1).

5.3.3.2 Illegal acts

5.3.3.2.1 *Administrative feature*

The other kind of conducts for which RETL can be imposed is illegal acts not punishable by criminal punishments. They are not criminal or serious enough to incur criminal punishments, and RETL is an administrative sanction for several reasons.

First, whether in legislation or practice, procedures for the examination and approval of RETL cases for illegal acts basically tend to be administrative, far from being judicial trial by a competent court.

According to the 1996APL, administrative organs should inform both parties of relevant facts, reasons, legal bases and rights in examination, involving the right to request a hearing for decisions. It seems that the offender has the chance of defending himself or herself before the decision-making stage. However, there is no such provision in regulatory documents on RETL until the 2002R-RETL. According to its Article 25, the public hearing mainly applies to all RETL cases with the possible term of RETL decisions for no less than two years, or with juvenile suspects. It also precludes offenders who organize or use superstitious cults to commit illegal or unlawful acts and those who inject or ingest drugs. With such a limited scope of RETL cases, there is no chance of hearing or defence for most of them in examination and approval.

In practice, the hearing system has been gradually established underway and undue deprivation of this hearing has been corrected in some areas.¹⁰⁴³

For example, the Beijing City Public Security Bureau established a new system, the hearing, for examination and approval of RETL cases in August 2003 according to the 2002R-RETL. On 4th September 2003, it heard the first RETL case involving theft and repeated drug injection by the suspect, Wang, in public, with participation of a lawyer and 3 officials from Beijing City RETLAC at the

¹⁰⁴³ PD 3

BCPSB.¹⁰⁴⁴ Police insisted on applying RETL for 2 years and 9 months to Wang because of his illegal acts, while the lawyer argued for the reduction or exemption of the 1 year and 3 months of RETL due to the mitigating factor of his confession. After this debate in hearing, the hearing group shall submit views of both sides to the RETLAC for final decisions.¹⁰⁴⁵

More important, regardless of hearing or not, it is examination and approval Committee composed of department directors in the police that handle RETL cases and make relevant decisions under the 2002R-RETL. In fact, police are exclusively responsible for examining and approving decisions of RETL in the name of the RETLAC, and even take the filling-in approach to decide it in writing. This oversimplified and outdated form appears to deviate from requirements of the open, transparent, multi-sided participation necessary for judicial procedures, not to mention a proper trial. As reported in 2003, police in Wuhan City imposed RETL on a taxi driver found guilty of charging excessive fees twice.¹⁰⁴⁶ Even if ostensibly this committee decided RETL, the police in effect control it¹⁰⁴⁷ and operate in camera.

There are three primary steps in this process according to the Regulations on Work of Examination and Approval Divisions of RETL by the Legal Affairs Office of the BCPSB. Firstly, pretrial departments of police at the level of no less than the county, such as those of the public security division in every district and the public security at the county level of Beijing, shall submit RETL cases to examination and approval bodies of RETL. Then, officials of these departments would examine whether legal procedures are complete or lawful, fill in relevant forms and reports, and advance any necessary proposals, followed by the level-by-level report. Finally, the director in charge of the examination and approval in police departments of Beijing City shall make written decisions of RETL for cases coincident with conditions of RETL, with the cachet of the RETLAC on them. Hence, this examination and approval is in the administrative and written form without a hearing, and offenders who lost the chance of participation in decisions tend to become passive objects to be acted on by the will of the police.

¹⁰⁴⁴ Xinhuanet 20

¹⁰⁴⁵ PD 3

¹⁰⁴⁶ CRLN

¹⁰⁴⁷ Chen Ruihua, in *Zhongwai Faxue*/2001/668

Second, administrative reconsideration is one of the remedial means designed to correct improper decisions of RETL. Persons undergoing RETL may apply for it to the RETLAC at a higher level or to the municipal government of the people, if disagreeing with such decisions.¹⁰⁴⁸ Where the RETLAC is chosen, police at the same level should accept applications for reconsideration of RETL cases and make decisions of administrative reconsideration in their name.¹⁰⁴⁹ This appears to be self-examination and self-correction inside the police system.

Meanwhile, such reconsiderations lack hearings available for a comprehensive and rational examination of original RETL decisions and fail to stop wrong ones in enforcement¹⁰⁵⁰. In *Gao's Case*, for instance, the police reported his case to the RETLAC of Sanmenxia City for a decision of two-year RETL because Gao had complained to the police of his county about the police sub-station many times.¹⁰⁵¹ Hence, this reconsideration is totally an administrative procedure under the disposal of the police or municipal governments.

Third, most persons undergoing RETL fail to resort to administrative litigation as the other means to remedy possible wrongs in RETL decisions, despite availability of provisions for such remedy.

Following establishment of administrative litigation in the 1990APL, the 2002R-RETL also specified that those who refuse to obey RETL decisions in RETL institutions may directly bring them to the PC.¹⁰⁵² This procedure required judicial examination and trials for RETL cases in courts with the police to attend in the name of the RETLAC at the same level.¹⁰⁵³

However, the rare application of administrative litigation was reported to merely up to around 25% of RETL cases in 2003,¹⁰⁵⁴ without other news on the increase of such a percentage after that. The potential reasons may result from several failings of this procedure.

First, current relevant provisions of laws and regulations provide the necessary procedures for reconsideration before administrative litigation of RETL.

¹⁰⁴⁸ 2002R-RETL Article 72(1)

¹⁰⁴⁹ Ibid./72(2)

¹⁰⁵⁰ Ibid./Article 74

¹⁰⁵¹ HNBY

¹⁰⁵² 2002R-RETL Article 73(1)

¹⁰⁵³ Ibid./73(2)

¹⁰⁵⁴ Rednet 2

It appears to actually hamper the right to choose between them as an obstacle to the final realisation of the right of appeal, and even deprives the party of the right to choose the reconsideration or the lawsuit.

Second, RETL decisions had begun to have legal effect and were being executed before the administrative litigation came into effect in execution. This appears too late or insufficient to rectify improper decisions and remedy legal rights and interests of persons undergoing RETL.

5.3.3.2.2. Violation of prohibition of forced labour

5.3.3.2.2.1 RETL at the Initial Stage

At the beginning, RETL was not only a measure for arranging employment to reduce social unemployment and give a reasonable salary under the salary assessment system, but also a measure for compulsory education and reform in nature. It aimed to assign employment and transform ‘those who had the ability to work but idled about’ without ‘decent work’ and those who ‘violated law and discipline’ into new self-sufficient and self-reliant people.¹⁰⁵⁵ This tends to violate some Articles in the ICCPR and ICESCR as follows.

First, basic characteristics of RETL consist of the general definition of forced labour and thus it runs contrary to the prohibition in ICCPR Article 8(3)(a). On the basis of the constitutional right and duty to work, citizens had to work, otherwise they were taken in RETL institutions to do labour as punishment. This indicates that RETL has the obvious feature of involuntary labour that violates Article 8(3)(a), apart from both ICCPR Article 8(3)(a) and ICESCR Article 6(1) that the Constitutional duty to work breaches.

Second, persons undergoing RETL do work to promote social rehabilitation, which is not based on court decisions. This is unable to conform to the requirements of ‘work in detention’ as an exception of forced labour, or protection of the right to liberty of person by national laws, and so is contrary to ICCPR Articles 8(3)(c)(ii) and 9.

¹⁰⁵⁵ The 1957D-RETL

Third, both the duty to work and forcible employment assignment influence on the opportunity to freely choose work against protection of the right to work under ICESCR Article 6(1).

5.3.3.2.2.2 The Present RETL

In the period of re-establishment, it evolved as ‘an administrative measure’ to impose compulsory education and reform, a method of ‘dealing with internal contradictions among people’, and then an administrative penalty.¹⁰⁵⁶ The purpose was changed to one of turning those subject to RETL into law-abiding persons who had sufficient “cultural knowledge and productive skills, were useful to society, respected public ethics, and loved the country and labour”.¹⁰⁵⁷ This tends to go contrary to the same articles as stated above.

First, this universal duty to work in the 1982 Constitution tends to run contrary to the obligation of States not to compel citizens to work in ICCPR Article 8(3)(a), and the opportunity to freely choose work against protection of the right to work under ICESCR Article 6(1).

Second, persons undergoing RETL are taken in RETL institutions to do labour as punishment against their will, which is consistent with the general definition of forced labour. But their work is not grounded on court decisions as legal bases and does not fall into the exceptions to forced labour, and of such grounds and procedures ‘as are established by law’ not to ensure the right to liberty of person by law.

Hence, RETL appears to be forced labour defined in ICCPR Article 8(3) and lead to restriction of personal liberty against ICCPR Article 9.

5.3.3.2.2.3 Other Violations of Human Rights Instruments

Despite the humanitarian care in certain aspects,¹⁰⁵⁸ the protection of the legal rights of persons under RETL remains a problem. Apart from the above-mentioned system of RETL itself, other relevant concerns also violate international human rights instruments.

¹⁰⁵⁶ 1982TM-RETL Article 2

¹⁰⁵⁷ Ibid.

¹⁰⁵⁸ Xinhuanet 21-22; PD 2

Specifically, it is universal that offenders undergoing RETL do overtime labour in enterprises of RETL institutions.¹⁰⁵⁹ But the practice of overtime labour tends to go contrary to the protection from it in 1982TM-RETL Article 32 and ICESCR Article 7.

Moreover, only some prisons pay labour remuneration to persons undergoing RETL who do labour in China, though 1957D-RETL No.2, 1982TM-RETL Article 45 and Labour Law of the PRC adopted in 1994 Article 3 require labour remuneration for them. The No.2 RETL institutions of Gansu Province began to first practice the system of moderate wages for persons undergoing RETL in China from 2002,¹⁰⁶⁰ followed by Guangdong province and Beijing City from 2003.¹⁰⁶¹ But it has not applied to all prisons in China so far and some of them tend not to provide labour remuneration in breach of both 1994LL Article 3 and 1982TM-RETL Article 45.

Furthermore, the incident of ill-treatment also occurred in RETL institutions because the management of RETL is worse than that of RTL without explicit legal provisions concerned¹⁰⁶². For instance, Zhang Bing undergoing RETL was inflicted with death by other inmates in April of 2003, which was highly regarded by senior leaders of the Central Government.¹⁰⁶³ It seems to be impossible for custodial officers not to be aware of this situation, but they are likely to allow some persons undergoing RETL to control, or inflict harm to, others without any punishments. According to his statement, he planned to spend 3,000 yuan to bribe policemen into changing his position to the fireman. This appears that the relationship between persons undergoing RETL and the officers may decide the kinds of assigned compulsory labour.¹⁰⁶⁴ Moreover, it is not unusual for custodial officers to torture, humiliate or prevent them from exercising the right to appeal. Thus, apparently, persons concerned suffer a lot such ill-treatment and even torture in RETL institutions.

5.3.4 Reform Measures

¹⁰⁵⁹ Wang Jue, in *JC/2004/52-54*

¹⁰⁶⁰ China Court 5

¹⁰⁶¹ Anhuinews

¹⁰⁶² China Court 6

¹⁰⁶³ Southcn 2

¹⁰⁶⁴ Ibid.

In recent years, a series of measures and efforts have been taken to further reform RTL and RETL in China. This could be demonstrated in several aspects as follows.

First, prisons attach more importance to education and reform of prisoners serving sentences as the final aim of labour in RTL. Some of them have taken on a new look with such unique phenomena as 'to construct the study category of prisons' and 'to turn periods of sentences into study terms'.¹⁰⁶⁵ For example, a Beijing prison has become the category of study with establishment of the education system with diverse levels, and a wide coverage and scale.¹⁰⁶⁶ Specifically, it sets up classes for removing illiteracy and education in both primary and middle schools and the numbers of prisoners that had graduated from its primary and middle schools were respectively 48 and 220 from 2000 till 2004.¹⁰⁶⁷ From over ten types of skilled training programmes, 966 persons obtained the certificate of national vocational qualifications in order to reach the goal of training persons serving sentences to be skilled workers.¹⁰⁶⁸ This is a typical instance of successful reform and education through labour because labour skills constitute the essential part of the above classes and programmes.

Moreover, RETL institutions further implement the policy of 'education, persuasion and redemption'. After the system of 'Two Opens and One Supervision'¹⁰⁶⁹ applied from 1999¹⁰⁷⁰, MOJ held a meeting on 'the full-scale practice to public affairs in RETL Institutions' to highlight and insist on transparency based on law in 2003. It is on the basis of the above system of 'Two Opens and One Supervision' that the new measure of transparency in public affairs in RETL institutions was established. As an important part of RETL enforcement work, this measure refers to that the RETLACs publicize the legal bases, procedures, relevant regulations and results of law enforcement to persons undergoing RETL and society under social supervision.¹⁰⁷¹ It has applied to lots of RETL institutions in all provinces of China, and one of RETL trial units in Liaoning Province, Panjin RETL Institution, welcomed social guests to visit it

¹⁰⁶⁵ JCRB 3

¹⁰⁶⁶ Ibid.

¹⁰⁶⁷ Ibid.

¹⁰⁶⁸ Ibid.

¹⁰⁶⁹ It refers to open regulations on the implementation, open results, and accept the social supervision.

¹⁰⁷⁰ Sina 1

¹⁰⁷¹ Legal Daily 2

from 15th January 2004¹⁰⁷². This has improved the transparent and civilized degree of RETL work, which tends to contribute to education and redemption of persons undergoing RETL.

Second, some prisons give prisoners who participate in labour reasonable wages by law, as many RETL institutions do for persons undergoing RETL concerned. With the rapid economic development, State finance has provided increasing funds, which seems adequate enough so that prisons tend not to depend on economic interests from prisoners' labour to meet the most fundamental needs.¹⁰⁷³ Accordingly, more and more prisons began to pay wages to prisoners per month according to their labour achievements. For instance, prison system of Fujian Province fully practised the system to provide pay for prisoners from April 2003 as the first in China, and prisoners may receive monthly 'wages' ranging from more than ten yuan to 300 yuan.¹⁰⁷⁴

Meanwhile, part of RETL institutions started to implement the system of labour remuneration and supplied it for persons undergoing RETL from 2002 in practice according to relevant legal provisions stipulated nearly half a century ago. For example, Guangdong Province has carried out this system since that year, extend such practice in full scale from 2004,¹⁰⁷⁵ and more than 90% of RETL institutions had implemented it by August of 2005.¹⁰⁷⁶

Third, various measures were adopted in an attempt to eliminate bullies in RTL or RETL institutions from 2003. In 2003, the IPC of Hanjiang District, Fujian Province, tried two cases concerning disrupting the order of supervision in Putian Prison so as to strike crimes of prison assault and promote criminals' reform.¹⁰⁷⁷ This has played an important role in safeguarding good order of management in prisons. In 2003, the MOPS and SPP jointly established model units to reinforce supervision over law enforcement in order to remove bullies to properly safeguard the legal interests of detainees, including prisoners and persons undergoing RETL.¹⁰⁷⁸ The Lanzhou City Public Security Bureau developed a 100 days'

¹⁰⁷² Xinhuanet 23

¹⁰⁷³ TFPAB-ZP, in *JC/2004/65*

¹⁰⁷⁴ Ibid.

¹⁰⁷⁵ Xinhuanet 24

¹⁰⁷⁶ NPC

¹⁰⁷⁷ China Court 4

¹⁰⁷⁸ JCRB 2

activity with the special purpose to crack down on prison bullies and protect lawful interests of detainees from being infringed.¹⁰⁷⁹

Nonetheless, the above measures for further progress merely involve a few respects with remained concerns and at a limited scale without coverage of every RTL or RETL Institution. Accordingly, it still appears a problem that not all legal provisions on RTL or RETL have been properly practised as they should be.

Meanwhile, even if some misjudged cases were finally rectified by law and lawful rights and interests of prisoners or persons undergoing RETL were maintained through certain remedial means, the course of resort to legal remedy is full of difficulties. For instance, Tang Yong who was arbitrarily decided by RETL suffered from severe torture in 2001, was still detained in the hospital of Xishanping RETL Institution with a first-class injury in 2003 when the troublemaker was arrested by law.¹⁰⁸⁰ Eventually, the troublemaker was sentenced to fixed-term imprisonment for 7 years and he obtained a huge amount of administrative compensation for the wrong RETL decision to him,¹⁰⁸¹ while there is no news on whether he was released or not then.¹⁰⁸²

Moreover, it appears difficult to prosecute administrative or legal responsibility of officers in prisons or RETL institutions who are responsible for cases regarding bullies among prisoners or persons undergoing RETL. Although such cases were frequently reported from 2003, related news tend to be publicized very late, several months or years after their occurrence¹⁰⁸³. Even if the SPC or local judicial departments highly regarded them and made notices or promises to instruct relevant units to seriously handle them, these instructions appear far from proper implementation to strictly punish officers involved by law.¹⁰⁸⁴ There seems a tendency to decrease responsible officers' responsibilities in dealing with such cases in fact.¹⁰⁸⁵

5.4 Conclusion

¹⁰⁷⁹ China Court 7

¹⁰⁸⁰ San Renxing, in *JF*/2003/30

¹⁰⁸¹ Ibid.

¹⁰⁸² Ibid.

¹⁰⁸³ For example, in 2003, the media reported the Case Zhang Bin with his death that happened more than 3 months ago, and Case Zhou Guoan who was beaten to death in June of 2001.

¹⁰⁸⁴ Xinhuanet 25

¹⁰⁸⁵ Ibid.

Although RTL and RETL are lawful sanctions in China as permissible compulsory work, both systems appear to breach the relevant human rights standards and deviate from its official policies concerned. Neither RTL nor RETL would meet the procedural requirements provided in Article 8(3)(b) or (3)(c)(i). Without the due process, any of them appears to be forced labour prohibited by ICCPR Article 8(3)(a) and breaches the minimum procedural guarantees provided in ICCPR Article 14. Since forced labour relates to the deprivation of the right to liberty and security of person and might be incompatible with the essential aim of reformation and social rehabilitation, both ICCPR Articles 9 and 10(3) would also be violated.

As forced labour regimes prohibited by international instruments, especially the ICCPR that China signed, both RTL and RETL leave much room for criticism in the aspects of their judicial process and essential purposes. Regardless of such condemnation, both Chinese systems tend to violate ICCPR Articles 8(3)(a), 9, 10(3) and 14. They also depart from the prohibition of forced labour as the relevant general policy of China; and the re-education and reformation of offenders undergoing RTL or RETL as fundamental purposes.

RTL and RETL have the same legal basis in the 1982 Constitution—the duty to work. This reflects the national value on work with Chinese characteristics and constitutes the basic reason for the difference from the relevant Western value. The duty appears inconsistent with the prohibition of forced labour in ICCPR Articles 8(3)(a) and the right to work required by both ICESCR Article 6(1) and ILO122 Article 1(2)(c). As a party to the ICESCR and ILO122, China has the treaty obligation to protect the right to work from being violated by particular or systematic instances. The inclusion of the duty to work in the 1982 Constitution might amount to patterns of systematic human rights violations of the above obligation. This duty should be revised as the right to work, together with its obvious conflicts with the practical situation of China.

Moreover, there are such phenomena as overtime labour, unreasonable pay of labour remuneration, poor conditions, inadequate insurance and compensation of labour, or discrimination in some RTL and RETL institutions. This appears to go contrary to China's treaty obligations enshrined in the ICESCR, ILO100 and ILO122. In the implementation of RTL or RETL, the possible occurrence of torture, cruel, or inhuman treatment tends to breach its obligation in the CAT. Where the

child below the age of 18 years is subject to RTL or RETL, this might also violate the CRC.

Furthermore, any compulsory work or service performed for the benefit of private sectors would amount to forced labour and not permissible compulsory work provided in ICCPR Article 8(3). Such compulsory work might constitute servitude, where private sectors have legal powers to effectively dominate forced labourer without ownership between them. If it is true that some private companies allocate contracts to labour camps to export products for their benefit, this would be forced labour and even servitude.

Although a series of reform measures has been taken to promote education and reform as the aim of labour, pay of reasonable wages, and elimination of bullies in recent years, some legal provisions on RTL or RETL remain not to be properly practised. Meanwhile, it appears difficult for prisoners or persons undergoing RETL to have recourse to remedy to protect legal rights and interests. Since treaty obligations might be violated by particular instances, RTL and RETL still breach the relevant rights detailed in the ICESCR, CRC, CAT, ILO100, ILO122 and ILO182, to which China is a party.

Therefore, RTL or RETL appears not to fall into the permissible compulsory work unless the requirements of proper procedures could be satisfied pursuant to ICCPR Article 8(3). The duty to work in the 1982 Constitution is the essential reason for the systematic violations of human rights regarding the prohibition of forced labour and associated rights at work. This mainly goes against China's treaty obligations in the ICESCR, ILO100, ILO122 and ILO182; and the ICCPR that China signed without ratification.

Chapter VI THE CONCLUSION

6.1 Assessment of a current approach to this research

6.1.1 Advantages

This research has sought to identify the scope and significance of China's human rights obligations on both capital punishment and detention for re-education. Further examinations and assessments revolve around the question of how far China's practice does conform to or deviate from its official policies and these international obligations.

It is desirable to first investigate what international human rights law requirements are with regard to capital punishment or forced labour. Major human rights standards on capital punishment require the respect for and protection of the right to life against arbitrary deprivation. Those on forced labour details the prohibition of forced labour in a range of respects. These matters are likely to be considered and questioned from any angles through various human rights reviews or dialogues on both subjects. In this sense, all criticisms and arguments seem meaningful, despite that not all of them are very apt or to the point.

Although China's present policy on capital punishment is to use it less and more carefully, this policy may still be subject to criticism from the point of view of human rights. Even where capital punishment is imposed for serious crimes, the absence of fair trial guarantees in the processes which determine guilt and punishment do not avoid the arbitrary nature of recourse to execution. It is the more so where there were arbitrary summary executions on grounds of political expediency during the 'Strike Hard' campaign. The means of execution and the events surrounding executions also may raise questions of torture, inhuman or cruel treatment – such matters as public executions, the despoliation of the bodies for organ transplants. These practices are difficult to reconcile with China's obligations under the CAT. The same goes for the use of capital punishment for juveniles and obligations under the CRC. The systematic nature of some of these practices may not be compatible with China's obligations under the Charter. So, even without considering the ICCPR and possible future obligations for China, there are matters to be considered under China's existing international treaty obligations.

Moreover, China maintains the prohibition of forced labour as its relevant official policy, with exceptions to RTL and RETL that are lawful sanctions in China as permissible compulsory work. Both systems have been condemned as donkeywork to support China's penal systems or a tool against dissenters, with harsh conditions, heavy work load, prevalent torture and other forms of maltreatment in RETL or RTL institutions. If this is the case, China appears to violate its treaty obligations detailed in the ICESCR, ILO100, ILO122, ILO182, CAT and CAR; customary obligation on the prohibition of forced labour as a non-persistent objector; or Charter obligations on the right not to be subjected to forced labour as a basic right.

The above-mentioned human rights discussions relate to the key question of what international human rights obligations China should have on capital punishment and forced labour. Under the Charter and customary international law, States are obliged not to engage in systematic violations of fundamental rights. In order to explore what laws and practices in China are customary, it is desirable to consider whether they are sufficiently widespread as part of official policy to amount to systematic violations. If this is the case, even if China were to claim to be a persistent objector for the purpose of customary international law, it would be acting incompatible with its Charter obligations. There is no doubt that the right to life and the freedom from forced labour are 'fundamental rights'. Not all State killing is a violation of the right to life. Capital punishment is an example but its use is subject to strict conditions designed to prevent the exceptional circumstances from being an excuse for arbitrary killing.

Any obligations which China may have under the Charter or even under customary international law are not very precise and are difficult to implement. If China were to become a party to the ICCPR, some of these problems would be eased. Meanwhile, China is legally bound by and should observe the CAT, CRC, CERD, GC3, GC4, PA1, PA2, ICESCR, ILO100, ILO122 and ILO182. Its treaty obligations would not permit the human rights abuses by individual instances, not to mention the systematic violations by States' authorities or officials.

Furthermore, the next task is to explore China's practice in an attempt to compare it with its due human rights obligations and official policies. In China, the practice may be classified as both legal and judicial. Since statute laws are the only

legal source in China, the practice appears to find the basis on the formal legal texts of China. Hence, examinations of both obligations and policies are primarily based on legal practices.

This project examines the relevant texts from a purely formal point of view without on-site investigations. It differs from the relevant research methods of any external bodies. For instance, the human rights reports of such NGOs as the AI and HRW, or of the USSD and Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment¹⁰⁸⁶ contain a lot of individual cases and unidentified evidence. These various documents appear to follow different approaches with the advantages of their own and thus reach conclusions diverse from that in this project.

One of major advantages of this thesis, however, is to test whether or not compliance with the formal law goes against all reliable sources or what the government says. Apart from an examination on the related legal texts, there is also case study, albeit very limited, to explore this compliance in practice. The facts of cases are obtained from official sources such as State-funded publications. The study on them aims at explaining the operation of the texts relating to capital punishment and forced labour in judicial practice. The relationship between the compliance and these reliable sources or governmental opinions would contribute to examination of the distinction between China's practice and official policies or its relevant human rights obligations.

In many aspects, the legislation and practice of China appear to conform to the ICCPR. These include most substantive and some procedural provisions for capital punishment. Where the procedural requirements of forced labour could be satisfied, RTL and RETL might fall into the exceptions in ICCPR Article 8(3). Meanwhile, China's practices remain distinct from its official policies and thus run counter to its human rights obligations concerning capital punishment or detention for re-education.

It is worthy of note that the above distinction and human rights violations largely relate to the right to fair trial or due process, which appears essential to be protected. Even if fair trial could be guaranteed, nonetheless, the legitimacy of the

¹⁰⁸⁶ UN Doc.E/CN.4/2006/6/Add.6

imposition of capital punishment and forced labour would remain. This appears to require China to faithfully fulfil all of the relevant obligations and even expect its ratification of the ICCPR.

6.1.2 Disadvantages

Meanwhile, it should be emphasised that there are several unavoidable limitations in this thesis, as in every research. The first is the definition of China. China refers to the PRC founded in 1949, which includes China Mainland, Hong Kong, Macao, and even Taiwan in territory. But various legal systems applicable to China Mainland are distinct from those applicable to the SARs owing to the policy of 'one country, two systems', and Taiwan for political and historical reasons. This difference and complexity increase the difficulty of exploring each system so greatly that it is unlikely for this project to entirely explain the death penalty or forced labour concerning human rights violations in all of these four regions. Since legal practices in China Mainland usually become the focus of human rights criticisms from the international community, it is desirable to examine the rights in the context of China Mainland as a reflection of a basic situation in China.

Secondly, available materials are secondary sources only, instead of empirical investigations about practice in China. Considering both distinction and complexity in diverse regions of such enormous territory in China, it is difficult to collect original data in the field by interviews, observations or questionnaires as an ordinary individual researcher. Thus, the only feasible one is written documents that could be used in this project.

The third is on the accuracy of secondary sources. These sources, numerical or verbal, are likely to be strongly influenced by the position, opinions, research methods or perspectives, of researchers, and appear not always to agree. It is hard to critically analyse potential limitations, influences and biases among them to weaken their accuracy, while it might as well be assessed by one another. In assessment, there are a range of questions to consider, e.g., whether it is a governmental source or information from a NGO, whether it depends on media reports, whether the source is official, or whether a foreign government or a UN body says. It is necessary to test compliance with the formal law against all reliable

sources and always against what the government says, whatever reservations one might have about its accuracy.

For example, AI reported that summary executions extended to child offenders¹⁰⁸⁷. It collected the relevant data and facts from media reports to obtain this information as a NGO. But this is different from the available information from Chinese official publications. As the 1997CL abolished the death penalty for defendants who were under 18 at the time of offence, the government says the exclusion of such children from capital punishment. Even if a rare case on the execution of children was reported by the State-funded public media of China, it is just an example of misjudged cases that have been found and State compensation would apply to in practice. The compliance with the 1997CL, as the relevant formal law of China, appears to go against all of such reliable sources as media reports known to the AI and the AI itself; and always against no execution of children, as the policy of the government. This basically indicates the differences and characteristics of them. These would assess one another in an attempt to clearly present the relationship between China's practices and official policies or human rights obligations in any aspect.

Fourthly, some popular research methods in social sciences seem inapplicable to this project due to the second and third limitations. Quantitative analysis is less applicable and only few decided cases are available as case study. However, a combination of the general theory on international law and China's practice are one of the primary methods, alongside qualitative and comparative analyses.

6.2 Obstacles to China's human rights protection

As demonstrated above, the Chinese legislation is limited and general, some of which seem not to conform to international human rights treaties to which China is a party or customary international law. On the way of China towards the ideal of human rights, there remains a distance from its due international human rights obligations.

Since human rights violations deeply 'implicate a State's political and social structures and culture' and protection involves efforts taken to change such

¹⁰⁸⁷ AI 18

‘understandings and assumptions that may underlie violations’,¹⁰⁸⁸, it is productive to address obstacles to this protection in China. The major obstacles being encountered by China in its attempts at human rights protection might be cultural and political in nature. These are the persistent resistance to ideas of individual rights and shortcomings of China’s criminal law and procedures, for its historical reasons, traditional culture and current policies, as indicated in the GENERAL INTRODUCTION.

In spite of numerous steps already taken to improve the legal systems, there still exist several loopholes in the current transition period of China which seem to increase the number of misjudged cases. The obstacles and focal points of further reforms can be explained from both perspectives of the legislative system and judiciary.

Basically, the Chinese legislation appears general and imprecise without adequate and effective interpretation. The poor legal texts and potential frequent change seem to result from the drafters lack of required experience, or that decision-makers keep out-of-date ideas or a lower level of competence. With the diverse understandings of legislators and the complex circumstances among various regions in the wide territory of China, legal provisions at the same level or between lower-level and high-level are likely to conflict with one another. Even worse, there is no effective channel to check and correct such inconsistencies and the legislation concerning certain systems appears disordered.

Specifically, both the applicable scope and procedural limits of the death penalty remain to be properly interpreted at a nationwide range, any interpretation of which should be consistent with others, relevant laws and regulations. Provisions relating to lawyers’ defence and defendants’ rights are expected to be improved to reinforce human rights protection on persons facing the death penalty. Moreover, the legislation on RTL or RETL appears to be full of directive and principled regulations, without explicit and precise details on some crucial issues, of which unified, rigorous, and concrete procedural regulations are insufficient. As vague definitions remain to be clarified, so also are the outdated stipulations remain to be eliminated.

¹⁰⁸⁸ Evans2/2003/757

For instance, the legal bases of RETL appear to be actually ineffective following the enactment of the 2000LL. Under the 1982Constitution Article 37, 2000LL Article 8 stipulates that ‘only national laws may be enacted’ ‘by the NPC and the Standing Committee thereof’ ‘in respect of matters relating to’ ‘compulsory measures’ ‘involving restriction of personal freedom’. However, no regulatory documents on RETL relating to ‘personal freedom’ were formulated ‘by the NPC and the Standing Committee thereof’. Hence, all legal bases of RETL, against the 1982Constitution and 2000LL, should be removed.

Furthermore, ‘the judiciary remains a weak link’¹⁰⁸⁹ in the chain of human rights protection in China. The Chinese judicial organs appear to have limited power and the ruling party or local governments may decide their staffing, funds and logistics resources. Considering the problem of dependent judicial systems, it seems difficult for them to resist the temptation of such political or economic interests and the interference from the above external bodies. Meanwhile, the extent of judicial interpretation does not cover the Constitution, but laws. As the Standing Committee of the NPC is the only organ with the power to interpret it, judicial organs have not this power, which is the premise of the review power on constitutionality. With this obstacle to establish the system of reviewing constitutionality in China¹⁰⁹⁰, they cannot examine whether regulatory documents have legal conflicts with the Constitution, e.g., a few inconsistencies in regulations on the death penalty, RTL or RETL. Since both the SPC and the SPP share the power of judicial interpretation on the specific legal application in trial and procuratorial work, inconsistent interpretations also appear to abuse the power and lead to misunderstandings in the practice of diverse courts.

Although the 1995JL and Prosecutors Law adopted in 2001 raised the standards for the competence of judges and prosecutors, training programmes funded by national or foreign institutions appear not to fully meet the practical need and many of them remain poorly trained. Both the poor situation of legal consciousness in Chinese traditional culture and the strong influence of feudal bureaucratism or regional protectionism are likely not to ensure the impartial decisions of prosecutors or judges in all cases. Opinions of the president of the PC

¹⁰⁸⁹ Peerenboom/2002/13

¹⁰⁹⁰ Wang Kewen, in *MLS/2000/72-74*

or the Director-General of the Adjudication Division, and even decisions of the trial committee are also possible to affect the final judgements made by judges. Another potential problem is the corruption among judicial officers that may distort implementation processes and tarnish the image and authority of judiciary.¹⁰⁹¹

In handling the death penalty cases, there is inadequacy of both staff and material resources. The present staffing levels and resources of the SPC are far from meeting the requirements to deal with the numerous death penalty cases transferred back from the HPCs amounting to around 90% of all involving the death penalty review. It is difficult for it to effectively handle a number of such cases on a national scale. Moreover, the specific procedure for review of the death penalty remains to be clarified, especially on its initiation means, nature, hearing approaches and contents of examination.

With limited resources, the means of lethal injection cannot be extended to all executions as an advanced and humane one. Another noticeable problem is that witnesses and expert examiners tend to be absent from courts without an effective witness protection system or compensation measures. It is impossible for the hearing of criminal proceedings to proceed without witnesses who may need to be cross examined whether on the basis of the written documents submitted or on the oral evidence adduced.

In addition, the PP appears not to provide adequate supervision to effectively find out some human rights breaches of all links in handling cases involving the death penalty, RTL or RETL due to the limited range of its supervision. This appears to lead to the difficulty for prisoners or persons undergoing RETL to resort to enough remedies to protect their legal rights and interests.

Therefore, for reasons of historical, cultural, social and political reasons, both legal and judicial systems of young China appear immature, of which the above matters are primary aspects to be improved and essential obstacles to further reforms for human rights promotion.

6.3 China's Possible Participation in International Human Rights Treaties

¹⁰⁹¹ Peerenboom/2002/18

Following China's signature of the ICCPR in 1998, the international community has frequently advocated China's ratification of the treaty and to faithfully perform its human rights obligations.¹⁰⁹² Different human rights organisations in China have embarked on joint efforts in attempt to march towards the ratification of the ICCPR. This seems to indicate the possibility of China's participation in ICCPR in the near future.

6.3.1 Human Rights Education

Human rights education is advantageous in sensitizing the awareness of members of the Chinese populace on human rights issues. A range of human rights organisations are the basic premise of promoting such education in China.

These can be roughly divided into three categories, that is, State organisations, NGOs and academics. The first includes: the NPC, Chinese People's Political Consultative Conference, PCs, PPs, State Council, Office of the Leading Group for Poverty Alleviation and Development, National Working Committee for Children and Women under the State Council, Military of Labour & Social Security, Ministry of Civil Affairs Commission, Ministry of Public Security and Ministry of Culture. The second comprises: the China Poverty-relief Foundation, All-China Federation of Industry & Commerce, All-China Federation of Returned Overseas Chinese, All-China Federation of Trade Unions, ALA, All-China Women's Federation, AYPF, China Disabled Persons' Federation, Communist Youth League of China, China Children and Teenagers' Fund, China Women Development Foundation and China Charity Federation. The third are the China Foundation for Human Rights Development, China Society for Human Rights Studies, Centre for Humanity Studies, Fudan University, WUC, Social Policy Research Centre, General Situation of Women and Gender Research Centre of Sen Yat-Sun University, Research Centre for Human Rights, Central Party Institution of CCP, Research Centre for Human Rights, Peking Law School, Research Centre for Human Rights, Shandong University, and Centre for Human Rights Studies, People's University of China.

¹⁰⁹² 'RSR-T', UN Doc. E/CN.4/2006/6/Add.6

Chinese human rights organisations have formulated a series of human rights education activities in diverse forms. Generally, State organisations have begun to promote human rights education through exercising their functions and powers with the inclusion of human rights protection in the Amendment to the Constitution of the People's Republic of China in 2004. As the highest organs of State power or the government's functional departments of China, the NPC,¹⁰⁹³ the CPPCC¹⁰⁹⁴, the State Council¹⁰⁹⁵ and its subordinate units seem to emphasise human rights in execution of powers. This was widely advocated by the long-established official media of China. Similarly, other State organisations appear to follow the same approach. They also have established their own websites to promote the specific forms of human rights education, apart from traditional official media. These appear to constitute part of the contents of the theme of 'Promoting Civilization and Unity Building Harmonious Society'¹⁰⁹⁶ in contemporary China.

Moreover, NGOs have actively participated in various social activities to contribute to human rights protection of certain groups of persons. This appears to directly or indirectly promote the human rights education of China to a certain degree. For example, the CPF engages in poverty alleviation programmes¹⁰⁹⁷ and the AFIC protects China's non-public economy¹⁰⁹⁸. This seems to show that relevant economic rights should be safeguarded. The AFTU and All-China Lawyers' Association undertake the duty to respectively protect 'the legitimate rights and interests of the workers'¹⁰⁹⁹ and of lawyers in the practice of law.¹¹⁰⁰ The All-China Youth Federation publishes daily newspapers with one of the largest circulation in China to popularize legal knowledge for human rights education of Chinese youths.¹¹⁰¹ The CCTF also works for the children and teenagers education and welfare¹¹⁰² in human rights perspectives. The CWDF contributes to 'improving women's overall quality, maintaining women's legal rights, promoting the

¹⁰⁹³ CHR 9

¹⁰⁹⁴ CHR 10

¹⁰⁹⁵ CHR 11

¹⁰⁹⁶ CHR Home

¹⁰⁹⁷ CHR 12

¹⁰⁹⁸ CHR 13

¹⁰⁹⁹ CHR 14

¹¹⁰⁰ CHR 15

¹¹⁰¹ CHR 16

¹¹⁰² CHR 17

development of women and women undertakings',¹¹⁰³ which amounts to part of human rights education. The CCF aims 'to uphold the spirit of humanitarianism' and 'help unfortunate individuals and groups of people and conduct various kinds of social relief work'.¹¹⁰⁴ This appears to favour the human rights protection and education of such groups.

Furthermore, academic research centers appear to play an indispensable role in human rights education. Some of the research centers actively organise researches, which generally focus on all facets of human rights, such as concerned education,¹¹⁰⁵ support teaching of human rights law,¹¹⁰⁶ and offer publicize 'human rights knowledge by offering human rights courses to graduates',¹¹⁰⁷. Meanwhile, they published books and articles concerning human rights theories to enrich human rights doctrines and increase the popularity of human rights knowledge. They also established academic ties with overseas human rights organisations and invited relevant international experts and scholars to give lectures and seminars. This tends to clarify the confusing points, remove the misunderstandings and promote the mutual understanding between China and international community, on human rights issues to improve the quality of human rights education.

Additionally, the internet has become an important medium for them to supply documents, publish latest news, analyse major or hotly debated cases, and exchange the varying schools of views, on human rights. Such information, in Chinese or English, is open to all researchers without exceptions. Some columns of their websites have been added to directly advocate human rights education, e.g., the 100 Questions and Answers on Human Rights¹¹⁰⁸, and Authoritative Forums¹¹⁰⁹.

6.3.2 Human Rights Research

In recent years, more and more human rights experts or scholars have taken an active role in human rights studies. A series of human rights research centers has

¹¹⁰³ CHR 18

¹¹⁰⁴ CHR 19

¹¹⁰⁵ CHR 20

¹¹⁰⁶ CHR 21

¹¹⁰⁷ CHR 22

¹¹⁰⁸ CHR 23

¹¹⁰⁹ CHR 24

been established to develop the various forms of activities and increase academic prosperity in human rights areas as national academic NGOs.

For instance, the RCHR-PLS aims to promote human rights studies, enhance ‘academic exchanges between domestic and overseas scholars’, back ‘teaching, research and education of human rights law’, foster ‘people’s human rights awareness’, and establish ‘an information center of human rights studies oriented towards the public’.¹¹¹⁰ The Research Centre for Human Rights, People’s University of China, also undertakes human rights projects from the State.¹¹¹¹ It ‘always systematically and thoroughly studies the human rights theory and enjoys priority in the academia’. Additionally, it has organised several essential human rights seminars and held relevant discussions with other international scholars to promote the study of human rights theory in China.¹¹¹²

More importantly, the preparation for the ratification of the ICCPR is one of the major topics in human rights research. It is universally accepted by both the academics and the Chinese Government that China needs to revise procedural laws and deepen ‘judicial reform to create conditions for ratification at early date’.¹¹¹³ Yet the specific respects and contents of these amendments remain controversial. Generally, researchers advocated a comprehensive revision to ensure that all Chinese legal systems conform totally to the requirements of the ICCPR, whereas official views are limited to the above.

Even among human rights or legal researchers, there are heated debates on what aspects to be amended and how to amend them in detail. Basically, these debates focus on the issues of the death penalty, RETL, torture and the fair trial. In addition to the related procedural matters, the mainstream opinion¹¹¹⁴ requires more respects to be revised in the following approach to fulfil the obligations in the ICCPR and safeguard relevant human rights.

The first and foremost is to restrict the use of the death penalty in order to effectively safeguard the right to life. The mainstream opinion promotes ‘reducing or abolishing the application of the death penalty to non-violent crimes, e.g.,

¹¹¹⁰ CHR 25

¹¹¹¹ CHR 26

¹¹¹² CHR 27

¹¹¹³ HRCoun 1/7/[IV]

¹¹¹⁴ ILOC

economic or property crimes'.¹¹¹⁵ 'No death penalty may be imposed on pregnant women' in all circumstances.¹¹¹⁶ It is also required to 'restore the power of the SPC to review death sentence cases; establish the system of commutation or amnesty; formulate the guideline on measuring capital cases; improve execution methods; reform applicable procedures of the death penalty; decrease the influence of penal policies on the imposition or execution of this penalty'.¹¹¹⁷

The second is to 'remove the system of RETL'.¹¹¹⁸ The third is to 'strictly limit the extent of judicial interpretations and prevent them from replacing legislative interpretations'.¹¹¹⁹ The fourth is to establish afresh 'international crimes that have not been recognized in criminal laws, e.g., the crimes of genocide, apartheid, forced labour and slavery'.¹¹²⁰

These results of research on human rights protection are likely to influence both legislative and judicial measures on the ground. Since legislative or judicial bodies frequently request the guiding opinions from authoritative experts in academic circles, human rights studies appear to contribute to potential human rights measures.

6.3.3 Human Rights Measures

Under the influence of increasing human rights education and research, more measures have been taken to promote the protection of human rights, especially those facing the death penalty or subject to RTL/RETL. These mainly involve the following aspects.

The first is open trials. The SPC requires all levels of the PCs to promote justice with openness in filing for investigation, court hearings, evidence submission, cross-examination, conclusion of trials, judgement documents and enforcement. All cases should be tried openly, except for those 'tried in camera, as specified by law'.¹¹²¹ Basically, this may apply to all cases involving those facing the death penalty or RTL/RETL.

¹¹¹⁵ Ibid.

¹¹¹⁶ Ibid.

¹¹¹⁷ Ibid.

¹¹¹⁸ Ibid.

¹¹¹⁹ Ibid.

¹¹²⁰ Ibid.

¹¹²¹ CHR 4

Since the 2005NPH, all HPCs have made efforts to reinforce this work and ensure the second instance of all such cases to be tried openly from the second half of 2006.¹¹²² This appears to contribute to improving the system that witnesses participate in court and strengthening the examination of whether evidence is legal or not. Such work is essential to effectively safeguard the justice of death sentences in the procedure for reviewing them and protect the relevant rights of those facing capital punishment.

The second is the system of people's jurors. The implementation of the 2004DISPJ further improves this system and ensures people's direct participation in and supervision of judicial activities¹¹²³ to promote judicial justice in various proceedings.

The third is the system of people's supervisors. With legal supervision strengthened by the SPP, neither procuratorial nor public security organs of China had extended detention by the end of 2004. It also strengthened prohibiting extortion of a confession by torture or other unlawful means to protecting suspects' legitimate rights pursuant to the LPMPS¹¹²⁴ and 2004OIS-A. Moreover, many of local PPs videotaped the whole course of interrogating the suspect in 2005 and will expand to all PPs in 2006.¹¹²⁵ This is used to fix evidence to strengthen supervision over interrogation to avoid illegally handling cases and prevent the suspect's withdrawing confession.¹¹²⁶

The fourth is the system of legal assistance. The 2004DPJALRFD has been implemented from 2004 to advance the system of judicial aid. Meanwhile, lawsuit fees were 'reduced, exempted or allowed to be delayed' so that all litigants can afford the payment with recourse to justice from the courts, regardless of financial conditions.¹¹²⁷

Another progress is to improve procedures of death sentence cases. The SPC has established three new criminal tribunals, responsible for review of national capital cases, on the basis of present criminal tribunals No.1 and No.2. This is expected to consist of around 100 qualified and experienced judges for each and

¹¹²² China Court 10

¹¹²³ CHR 4

¹¹²⁴ China Court 11

¹¹²⁵ China Court 12

¹¹²⁶ Ibid.

¹¹²⁷ CHR 3

have both Director-General and Deputy Director-General in place.¹¹²⁸ Its Research Office is drafting opinions on implementing the reform of central judicial systems and plans to report the relevant leading team for a reply, including the term of taking back the power to approve death sentences.¹¹²⁹

Furthermore, the management of detention institutions and humane treatment are also important points. The MOJ began to practise open prison management in an all-round way, promoting law-based prison work, and building a just, incorruptible, free of abuses and highly efficient prison system from 2003. The MOPS and SPP have jointly built a large number of model detention houses with advanced facilities, standard law enforcement and humane management. Procurators directly work and supervise the management in almost all prisons, detention houses and RETL camps. There is no case of extended detention under investigation in police among 31 provinces in 2005.

Additionally, three categories and standards are under consideration and formulation for the detained to improve reforms on prison management.¹¹³⁰ The revision of three major procedural laws has been listed in the legislative plans of the NPC.¹¹³¹ The legal rights and interests of people in custody are likely to be properly protected. For instance, prisoners' right to apply for marriage is guaranteed during the period of serving sentences in practice.¹¹³²

Therefore, China has taken positive measures to satisfy its human rights obligations regarding capital punishment and detention for re-education, in spite of obvious lacuna in its human rights law. Following the signing of the ICCPR, its ratification is expected and promising, even if there still seems to be a long way to achieving relevant requirements and even final ratification. The important thing, however, is that this process has begun and the ratification of the ICCPR would no doubt be the next step to be taken.

¹¹²⁸ NetEase

¹¹²⁹ China Court 13

¹¹³⁰ China Court 14

¹¹³¹ China Court 15

¹¹³² China Court 16

GENERAL CONCLUSION

China's society has undergone revolutionary economic change since 1978 but, such are the dimensions of the State, its people and its economy, this is a process which still has far to run. It does not necessarily follow that economic change will be accompanied by or even be followed by political change. Even if that happens, it is not certain that China would embrace whole-scale international human rights project. On this point, China would not be alone. Many States maintain a distinction between accepting international human rights obligations and submitting to intrusive measures of implementation. While China's recent statements about human rights and its willingness to accept visits under the UN special procedures indicate changes in its general attitude towards human rights, it has stopped short of taking the most obvious step, of ratifying the ICCPR.

Although the ICCPR has not yet legally imposed on China treaty obligations, China should abide by all the relevant treaty obligations that it accepted regarding capital punishment or forced labour, as a party to the CAT, CRC, CERD, GC3, GC4, PA1, PA2, ICESCR, ILO100, ILO122 and ILO182. Meanwhile, its related customary obligations mainly contain the protection of the right to life against its arbitrary deprivation, the exclusion of capital punishment from being imposed on persons below 18 years old and the exemption of pregnant women and the insane from being executed. The prohibition of torture, cruel, inhuman or degrading treatment or punishment, and the right to non-discrimination and equality also appear to be customary. While appearing in the ICCPR, to which China is not a party, these obligations universally bind all States, including China, considering that China is not a persistent objector.

The position under the Charter is the same as under customary international law-States are obliged not to engage in patterns of gross and flagrant violations of human rights. The obligation has several facets to it but where States' legal authorities and/or State officials engage in practices on a wide scale which violate the most basic human rights, then a State would be said to be in breach of its general human rights obligations. The obligations which arise under international treaties like the ICCPR are different because individual instances will amount to breach of the treaty obligations and the treaties are generally accompanied by

precise implementation measures which are intended to provide a legal machinery for implementation and enforcement of human rights.

In both China's legislation and its practices, in many respects China appears to conform to what could be required if it were a party to the ICCPR so far as its use of the death penalty and forced labour concerned. Most of its substantive aspects and some procedures for capital punishment tend to conform to China's human rights obligations concerning capital punishment and favour its death penalty policy. However, the applicable scope of capital punishment still has a broad coverage and not all pregnant women can be exempted from being imposed on this penalty. These would not meet the requirements of China's relevant human rights obligations. Also, some of human rights safeguards appear to be seriously abused. These are the right to presumption of innocence, to the prohibition of self-incrimination, to defence, to legal aid, to a fair trial, to humane treatment, to equality before the law and the principle of *ne bis in dem*. In judicial practice, the right to a public, independent, and impartial trial, to appeal, to criminal compensation, and the principle of *nulla poena sine lege* tend to be violated. Among them, the right to fair trial appears to be the common failure.

For RTL and RETL, the practices appear to fall into the exceptions, if satisfying procedural requirements, provided in ICCPR Article 8(3). There may be systematic violations which arise out of the duty to work in the Chinese Constitution and certain associated rights, e.g., the right to reasonable levels of remuneration. It is thus the connection between the implementation of the duty to work and recourse to RTL and RETL which is a source of potential difficulty.

For the implementation of both capital punishment and the forced labour regimes, there are possibilities of violations of the standards against torture, cruel, inhuman or degrading treatment. This tends to raise problems with China's treaty obligations under the CAT and the CRC.

Although it has been only an incidental concern in the thesis, it is worthy returning to the point made at the beginning – there are serious concerns about the fairness of the Chinese criminal justice system which could potentially affect the imposition of any criminal penalty, not just those which have been considered in detail here. As was noted then, China is addressing the question of criminal justice but, even if it did so in large satisfaction of the standards of the ICCPR, the other

question about the legitimacy of the imposition of capital punishment and forced labour would remain.

This thesis has shown that there would be difficulties for China if it did so but wished to persist with certain 'harsh' or 'severe' punishments as items in its system of criminal sanctions. Equally, there is some space for China to maintain its present practices, even to maintain the death penalty in restricted circumstances. Nonetheless, it cannot be denied that the prohibitions on the use of capital punishment and the limits the rule against forced labour imposes on some of China's re-education schemes are strong and, what is more, probably beyond any valid reservation if China did become a party to the ICCPR. At the beginning of the thesis, I postulated the sceptical Chinese official to whom the thesis might be addressed. I do not anticipate how government officials might react but perhaps a start of officials is responsive to this thesis and work like it. If Chinese judges are aware of the international human rights standards and, given that there is usually a margin of discretion in any sentencing decision, they might inform their judgements by taking into account, without at all being bound by, the standards of international human rights law.

